TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ ~~1913~~ 1914

No. ~~701~~ [redacted] 59

WILLIAM SIZEMORE AND JEANETTA NEWBERRY,
PLAINTIFFS IN ERROR,

vs.

FOIL M. BRADY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED SEPTEMBER 24, 1912.

(23,366)

(23,366)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 791.

WILLIAM SIZEMORE AND JEANETTA NEWBERRY, PLAINTIFFS IN ERROR,

vs.

FOIL M. BRADY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, together with all things concerning the same, and having attached thereto this writ and return, petition for writ, assignments of error and citation.

In witness whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of Oklahoma in the City of Oklahoma this the 7" day of September, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

b [Endorsed:] No. —. William Sizemore and Jeanetta Newbury, Plaintiffs in Error, vs. Foil M. Brady, Defendant in Error. Return to Writ of Error.

c SUPREME COURT,
State of Oklahoma, ss:

I, W. H. L. Campbell, clerk of said court, do hereby certify that they were lodged with me, as clerk — said court, on the 3rd day of September, 1912, in the matter of Foil M. Brady, versus William Sizemore and Jeanetta Newberry, the following papers:

(1) The original bond, of which a copy is herein set forth.
(2) Two copies of the writ of error, as herein set forth; one for the defendant and one for file in any office.
(3) Writ of error and assignments of error, and petition for writ of error, and citation to Foil M. Brady;

the originals of which said papers accompany this record, and are attached thereto, and copies thereof are in my office.

In witness whereof, I hereunto set my hand and affix the seal of said court in the City of Oklahoma this the 7" day of September, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Foil M. Brady, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein William Sizemore and Jeanetta Newberry are plaintiffs in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in *thier* behalf.

Witness, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this the 3rd day of September, 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

2 STATE OF OKLAHOMA,
County of Muskogee, ss:

W. D. Halfhill, being first duly sworn, on oath states that on the 5th day of September, 1912, in the city and county of Muskogee, State of Oklahoma, he served the above and foregoing citation on Grant Foreman, one of the attorneys of record of Foil M. Brady, by delivering to him, in person, a true, full, correct and accurate copy of the same, such copy being in fact a carbon of said citation, made at the same time with such citation.

W. D. HALFHILL.

Subscribed and sworn to before me this the 5th day of September, 1912.

[Seal R. C. Piper, Notary Public, Muskogee County, Okla.]

R. C. PIPER,
Notary Public, Muskogee County, Oklahoma.

My commission expires August 17, 1915.

Filed Sep. 7, 1912. W. H. L. Campbell, Clerk.

3 [Endorsed:] No. —. William Sizemore and Jeanatta Newbury, Plaintiffs in Error, vs. Foil M. Brady, Defendant in Error. Citation. Filed Sep. 7, 1912. W. H. L. Campbell, Clerk.

4 Filed Sep. 3, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States of America.

No. —.

WILLIAM SIZEMORE and JEANETTA NEWBERRY, Plaintiffs in Error,
vs.
FOIL M. BRADY, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States and the Other Associate Justices of said Court:

Now come William Sizemore and Jeanetta Newberry, plaintiffs in error in the above cause, and would show unto this honorable court that in the record and proceedings and rendition of a decree in the above cause by the Supreme Court of the State of Oklahoma, it being the highest court of said state in which a decree could be had on said suit between William Sizemore and Jeanetta Newberry and Foil M. Brady, manifest error has occurred, greatly to their damage, whereby petitioners feel aggrieved:

That in the record and proceedings it will appear that there was drawn in question the construction of a clause of the treaty or agreement between the United States of America and the Creek or Muskogee Tribe or Nation of Indians, and the decree was against the right, title and privilege especially set up and claimed under
5 said clause of said treaty by these plaintiffs in error, the manner in which the same arose being as follows:

In a certain cause pending in the Supreme Court of Oklahoma, wherein Foil M. Brady was plaintiff, and William Sizemore and Jeanetta Newberry, these plaintiffs in error were defendants, in which it appeared that on August 23, 1902 the Commissioner of the Five Civilized Tribes issued to the heirs of Ellis Grayson, a duly enrolled citizen of the Creek Nation, and who was entitled to an allotment of 160 acres of land belonging to said tribe or nation of Indians, a certificate of allotment covering the Northwest Quarter of the Southwest Quarter (NW. ¼ SW. ¼) Section 13, Township 17 North, Range 17 East, and the Southeast Quarter of the Northwest Quarter (SE. ¼ NW. ¼) and Lots 1 and 2 of Section 19, Township 17 North, Range 18 East, containing 163.60 acres; and on June 13, 1905 the Principal Chief of the Creek Nation executed deed to the heirs of Ellis Grayson to said lands, which deed was duly approved by the Secretary of the Interior.

Ellis Grayson died intestate March 1, 1901, leaving him surviving neither child or children, nor their de-cendants; neither father nor mother, nor brother nor sister, nor their de-cendants, but leaving him surviving Foil M. Brady, the son of an aunt on the paternal side, and William Sizemore and Jeanetta Newberry, children of an

aunt on the maternal side, and Ellis Grayson never made a selection of an allotment of lands of the Creek Nation during his lifetime.

In said suit the Plaintiff therein, Foil M. Brady, claimed to be the sole heir of Ellis Grayson, and entitled to possession, use and enjoyment of said lands under and by virtue of Chapter 49, Mans-
field's Digest of the Laws of Arkansas, put in force in the
6 Indian Territory by Act of Congress, said lands passed to
Foil M. Brady in fee simple under the provisions of said Chapter 49 of Mansfield's Digest of the Laws of Arkansas, under and by virtue of the provisions of the Indian Appropriation Act of May 27, 1902, 32 Statutes At Large 258, Chapter 888, and Section 6 of the Act of Congress approved June 30, 1902, ratified July 26, 1902, 32 Statutes at Large 500, Chapter 1323, known as the Creek's Supplemental Agreement, and further claimed that no title passed under Section 28 of the original Creek Agreement, ratified May 25, 1901, being Act of March 1, 1901, 31 Statutes At Large 870; and that William Sizemore and Jeanetta Newberry consequently took no interest in said above described lands, and no part thereof; while these plaintiffs in error, William Sizemore and Jeanetta Newberry, claimed that said lands passed to the heirs of Ellis Grayson under the Creek Law, as provided in Section 28 of the original Creek Agreement, being the Act of Congress last above cited.

On the trial of the cause below the trial court entered a judgment and decree, finding against claim of the said Foil M. Brady, and in favor of the claim of these plaintiffs in error, William Sizemore and Jeanetta Newberry, and holding said lands above described passed to and vested in William Sizemore and Jeanetta Newberry under and in accordance with the provisions of Section 28 of Act of March 1, 1901, 31 Statutes At Large 870, known as the original Creek Agreement.

On the hearing of said cause on appeal to the Supreme Court of Oklahoma said Supreme Court held in favor of the contention of said
Foil M. Brady that said lands passed under Chapter 49 of
7 Mansfield's Digest of the Laws of Arkansas in accordance
with the provisions of the Act of Congress of May 27, 1902, and the Act of June 30, 1902, known as the Creek's Supplemental Agreement, and did not pass under Section 28 of the Act of March 1, 1901, known as the original Creek Agreement, and the title to said lands vested in Foil M. Brady, and these plaintiffs in error, William Sizemore and Jeanetta Newberry had no interest therein, and rendered judgment accordingly; said decision and judgment being adverse to and against the rights set up by these plaintiffs in error as the owners of said lands under and by virtue of said Act of March 1, 1901, all of which is fully apparent in the record and proceedings of the cause, and specially set forth in the assignment of errors filed herewith.

That said decision of the Supreme Court of the State of Oklahoma necessarily involved the construction and operation of each of the above named treaties or agreements between the United States of America and the Creek or Muskogee Tribe or Nation of Indians; the validity and effect of each of said treaties, insofar as the same

affected the rights of said Foil M. Brady, William Sizemore and Jeanetta Newberry to the ownership of the lands being necessarily involved; said lands belonging to Foil M. Brady in event the Court should hold said lands passed under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, in accordance with the Act of Congress, known as the Creek's Supplemental Agreement; and said lands passed to and vested in William Sizemore and Jeanetta Newberry in event the Court should hold said lands passed under the Creek Law, in accordance with the provisions of Section 28 of the Act of March 1, 1901, known as the original Creek Agreement.

8 Wherefore, petitioners pray that their appeal be allowed, and that a writ of error be issued from this honorable court, directed to the Supreme Court of the State of Oklahoma, commanding that a transcript of the record, proceedings and papers, upon which said order, judgment and decree were made, rendered and entered, duly authenticated, be sent to the Supreme Court of the United States at Washington, D. C. under the rules of said court in such cases made and provided; that the same may be inspected and corrected as according to law and justice should be done, and that said cause be remanded to the Supreme Court of Oklahoma with instructions to vacate and set aside the judgment heretofore rendered in said cause, and enter judgment therein in favor of William Sizemore and Jeanetta Newberry, holding that they are the owners and entitled to the possession, use and enjoyment of said above described lands, or that this court render such judgment or decree on the record as it may deem meet and proper.

JAMES B. DIGGS,
W. D. HALFHILL,
Solicitors for William Sizemore and Jeanetta Newberry.

9 [Endorsed:] No. —. In the Supreme Court of the United States of America. William Sizemore and Jeanetta Newberry, Plaintiffs in Error, vs. Foil M. Brady, Defendant in Error. Petition for Writ of Error. Filed Sep. 3, 1912. W. H. L. Campbell, Clerk

10 Filed Sep. 3, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE and JEANETTA NEWBERRY, Defendants in Error.

Assignments of Error.

And now on this the 3d day of September, 1912, come the defendants in error, by their solicitor, James B. Diggs, and avers that the decree and judgment rendered and entered in the above cause

upon the 14th day of May, 1912, is erroneous and unjust to these defendants in error, and the court committed error of law in rendering and entering such judgment and decree in the following particulars:

I. The court committed error of law in holding the lands described in the petition herein did not devolve and pass under the Creek Law, in accordance with provisions of Section 28 of the Act of Congress of May 1, 1901, known as the original Creek Agreement, and that William Sizemore and Jeanetta Newberry were not, as heirs of Ellis Grayson, entitled to inherit, share in or own lands of the Creek Tribe or Nation of Indians, which the said Ellis Grayson would have been entitled to receive had he lived.

II. In rendering and entering said judgment and decree the Supreme Court of Oklahoma committed error of law in holding
11 that it was necessary for Ellis Grayson to have made a selection of the lands of the Creek or Muskogee Tribe or Nation of Indians before his death, in order for such allotment of lands, when made, to pass to and vest in the heirs of Ellis Grayson under the Creek Law, and in holding said allotment not having been selected by Ellis Grayson in his lifetime, it on his death on March 1, 1901, leaving him surviving neither child nor children, nor their de-cendants, neither father nor mother, nor brother nor sister nor their de-cendants, but leaving him surviving Foil M. Brady, a son of an aunt on the paternal side, and William Sizemore and Jeanetta Newberry, children of an aunt on the maternal side, said William Sizemore and Jeanetta Newberry had no right to take and never became vested with any right, title or interest in said land, when a deed thereto was issued under the terms of the Creek Law.

III. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that the right and title to the lands allotted to the heirs of Ellis Grayson devolved and passed under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, under and by virtue of the Act of Congress of May 27, 1902, 32 Statutes At Large 258, and the Act of June 30, 1902, Chapter 1323, 32 Statutes At Large 500, and became vested in Foil M. Brady and not in William Sizemore and Jeanetta Newberry.

IV. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that the allotment of Ellis Grayson, a duly enrolled citizen of the Creek Nation, who died on March 1, 1901, before receiving his
12 allotment, for which on August 23, 1902, a certificate of selection was issued to the heirs of Ellis Grayson, passed to the heirs of Ellis Grayson under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, and that said Chapter 49 of Mansfield's Digest of the Laws of Arkansas governed the devolution of allotments under the provisions of the Act of May 27, 1902, 32 Statutes At Large 258, Chapter 888, and Section 6 of the Act of Congress of June 30, 1902, Chapter 1323, 32 Statutes At Large 500, known as the Creek's Supplemental Agreement, and the devolution of said allotment was not governed by the provisions of Section 28 of the Act of March 1, 1901, Chapter 676, 31 Statutes At Large 870, known as the

original Creek Agreement, and in adjudging and decreeing that these defendants, William Sizemore and Jeanetta Newberry, had no interest, title or estate in said lands.

V. The Supreme Court of the State of Oklahoma committed error of law in rendering and entering said judgment and decree in setting aside the judgment of the trial court, holding that said allotment passed under the Creek Law and vested in William Sizemore and Jeanetta Newberry, and in ordering said trial court to enter a judgment holding Foil M. Brady to be the owner of, and entitled to the right, interest and estate in said lands to the exclusion of William Sizemore and Jeanetta Newberry.

VI. The Supreme Court of the State of Oklahoma committed error of law in rendering and entering said judgment and decree, by holding that when Ellis Grayson, a duly enrolled member of the Creek or Muskogee Tribe or Nation of Indians, who died March 1, 1901, without having selected an allotment of lands
13 of the Creek Nation, no interest in said lands, on his death, passed to and vested in his heirs under the original Creek Agreement, and that no interst in said lands passed to or vested in anyone until on and after the selection thereof, and said lands being selected on March 23, 1902 the title thereto devolved on and vested in the heirs of Ellis Grayson under the provisions of Chapter 49 of Mansfield's Digest of the Laws of Arkansas, and did not devolve on or vest in the heirs of Ellis Grayson under the Act of Congress, known as the original Creek Agreement.

VII. Ellis Grayson, a duly enrolled citizen of the Creek or Muskogee Tribe or Nation of Indians, having died prior to the going into effect of the original Creek Agreement, and before having received his allotment of lands of the Creek Nation, the court committed error of law in the rendition and entry of said judgment and decree in not holding the lands to which the said Ellis Grayson would have been entitled, if living, descended to his heirs according to the law of descent and distribution of the Creek Nation, and should be allotted to them accordingly.

VIII. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that Section 28 of the Act of March 1, 1901 was repealed by Section 6 of the Act of June 30, 1902, insofar as said Act affects the descent or devolution of the lands described in the petition.

IX. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in not
14 holding that Section 28 of the Act of June 30, 1902 and the Act of May 27, 1902, insofar as the same undertook to repeal Section 28 of the Act of March 1, 1901, were prospective only in operation, and did not apply to or govern the devolution of lands, where the person entitled to select such lands died prior to the passage of said Acts, and that as to persons entitled to select allotments under the Act of March 1, 1901, and who died without so doing, the right to select such lands and to receive deeds therefor vested in the heirs of such person under the Creek Law in accordance with the provisions of the original Creek Agreement.

X. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in overruling and denying the petition of these defendants in error for a rehearing thereof.

Wherefore, These defendants in error pray that said judgment and decree be reversed and the Supreme Court of Oklahoma be ordered and directed to render and enter a judgment and decree herein, affirming the judgment of the District Court, quieting the title to the lands described in the petition herein in William Sizemore and Jeanetta Newberry, or that the Supreme Court of the United States reverse the judgment and decree herein entered by the Supreme Court of Oklahoma, and render such decree as may be proper on the record submitted.

JAMES B. DIGGS, *Solicitor.*

15 [Endorsed:] No. —. In the Supreme Court of the State of Oklahoma. Foil M. Brady, Plaintiff in Error, vs. William Sizemore and Jeanetta Newberry, Defendants in Error. Assignments of Error. Filed Sep. 3, 1912. W. H. L. Campbell, Clerk.

16 Filed Sep. 3, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE and JEANETTA NEWBERRY, Defendants in Error.

Order of Allowance.

On this the 3rd day of September, 1912, came on to be heard the application of William Sizemore and Jeanetta Newberry, defendants in error, said defendants being represented by counsel, for a writ of error in the above entitled cause, and it appearing to the court from the petition filed herein and the record filed therewith, that the application ought to be granted, and a transcript of the record, proceedings and papers upon which the judgment and decree of the court was rendered and entered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in said petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the defendants giving bond, conditioned as the law directs, in the sum of One Thousand ($1,000.00) Dollars, and that a true copy of the record, assignment of errors, and all proceedings had in the Supreme Court of Oklahoma be transmitted to the Supreme Court

of the United States, properly certified as the law directs; that
17 said court may inspect the same and do whatever, according to law, should be done.

Witness The Honorable Edward D. White, Chief Justice of the United States Supreme Court this the 3rd day of September, 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

18 [Endorsed:] No. —. In the Supreme Court of the State of Oklahoma. Foil M. Brady, Plaintiff in Error, vs. William Sizemore and Jeanetta Newberry, Defendants in Error. Order of Allowance. Filed Sep. 3, 1912. W. H. L. Campbell, Clerk.

19 Filed Sep. 5, 1912. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Foil M. Brady and Williams Sizemore and Jeanetta Newberry, wherein was drawn in question the validity of a treaty, or statute, or authority exercised under the United States, and especially the validity and construction of the Act of March 1, 1901, 31 Statutes At Large 870, known as the original Creek Agreement, and the decision was against their validity and the validity of said statute, and against the rights set up and claimed thereunder, and there being manifest error in said decision, greatly to the damage of William Sizemore and Jeanetta Newberry, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court of the United States at Washington, D. C. within thirty days from this date, *and* the proceedings aforesaid being inspected the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States the 3rd day of September, in the year of our Lord Nineteen Hundred and Twelve.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court of the Western District of Oklahoma.

Allowed September 3rd, 1912.
JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

[Endorsed:] No. —. In the Supreme Court of the United States of America. William Sizemore and Jeanetta Newberry, Plaintiffs in Error vs. Foil M. Brady, Defendant in Error. Writ of Error.

In the Supreme Court of the State of Oklahoma.

No. —.

FOIL M. BRADY, Plaintiff in Error,
v.
WILLIAM SIZEMORE and JEANETTA NEWBERRY, Defendants in Error.

Bond on Appeal.

Know all men by these presents, That we, William Sizemore and Jeanetta Newberry as principal- and P. J. White and F. B. Ufer, as sureties, acknowledge ourselves to be jointly indebted to Foil M. Brady, appellee in the above-cause in the sum of One Thousand Dollars conditioned that,

Whereas on the 14th day of May, 1912, in the Supreme Court of the State of Oklahoma in a suit pending in that Court wherein Foil M. Brady was plaintiff in error and William Sizemore and Jeanetta Newberry were defendants in error, entered on the docket of said Court as Foil M. Brady vs. William Sizemore and Jeanetta Newberry, a decree was rendered against the said William Sizemore and Jeanetta Newberry and the said William Sizemore and Jeanetta Newberry having obtained an appeal to the Supreme Court of the United States of America, and filed a copy thereof in the office of the Clerk of the Court to reverse said decree and a Citation directed to the said Foil M. Brady, admonishing him to be and appear in the Supreme Court of the United States of America to be holden in the City of Washington, District of Columbia on the — day of October, 1912, next.

Now, if the said William Sizemore and Jeanetta Newberry shall prosecute their appeal and answer for all costs if they fail to make

their plea good, then the above obligation be void, otherwise to remain in full force and virtue.

WILLIAM SIZEMORE,
By JEANETTA NEWBERRY,
Att'y in Fact;
JEANETTA NEWBERRY,
Principals.

23

P. J. WHITE,
F. B. UFER,
Sureties.

STATE OF OKLAHOMA,
County of Tulsa, ss:

We, P. J. White and F. B. Ufer, Sureties on the above and foregoing obligation, and being resident freeholders of Tulsa County, Oklahoma, do each for himself says that he is worth more than Two Thousand Dollars over and above all of his debts, liabilities and obligations and exemptions under the laws of the State of Oklahoma.

P. J. WHITE.
F. B. UFER.

Subscribed in my presence and sworn to before me this the 31st day of August, 1912.

[SEAL.]

O. F. MACON,
Notary Public.

My commission Expires May 22, 1913.

Endorsement: No. —. In the Supreme Court of the State of Oklahoma. Foil M. Brady, Plaintiff in Error, vs. William Sizemore and Jeanetta Newberry, Defendants in Error. Bond on Appeal. Approved this 3rd day of September, 1912. John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma. (Filed September 3, 1912, W. H. L. Campbell, Clerk.)

24 Filed Aug. 23, 1909. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants in Error.

Petition in Error.

Comes now the said Foil M. Brady, plaintiff in error, and complains of William Sizemore and Jeannetta Newberry, said defendants in error, for that the said William Sizemore and Jeannetta Newberry, at the May term of the District Court of Wagoner County, State

of Oklahoma, to-wit: on the 7th day of May, 1909, recovered a judgment, by the consideration of said Court, against the said Foil M. Brady, in a certain action then pending in the said Court, wherein the said Foil M. Brady was plaintiff, and the said William Sizemore and Jeannetta Newberry were defendants.

A transcript of the original case-made, duly certified and attested, is hereunto attached, marked "Exhibit A" and made a part of this petition in error; and the said Foil M. Brady avers that there is error in the said record and proceedings, in this to-wit:

First. The Court erred in overruling the motion of the plaintiff in error for a new trial.

Second. The Court erred in rendering judgment in favor of the defendants in error and against the plaintiff in error on the pleadings, proof and Master's report in said cause.

Wherefore, the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and against the defendants in error, upon the findings of fact by the Master and the Court, and that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment, and for such other relief as to the court may seem just.

FOIL M. BRADY,
Plaintiff in Error.
By THOMAS & FOREMAN,
Attorneys for Plaintiff in Error.

25 Filed Aug. 23, 1909. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants in Error.

26 In the District Court.

STATE OF OKLAHOMA,
Wagoner County, ss:

I, A. L. Snyder, Clerk of the District Court in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and complete copy of the original case made in the case of Foil M. Brady vs. William Sizemore and Jeannetta Newberry No. 1478, as the same appears on file in my office.

Witness my hand and the seal of said Court, affixed at my office in the City of Wagoner, Oklahoma, this 11 day of August, 1909.

[SEAL.]

A. L. SNYDER,
Clerk of the District Court.
By —— ——, *Deputy.*

In the District Court of Wagoner County, Oklahoma.

No. 1478. Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Case Made.

Filed Aug. 23, 1909. W. H. L. Campbell, Clerk.

Be it remembered that heretofore, to-wit: on the 8th day of December, 1905, the above named plaintiff, Foil M. Brady, instituted this suit against said defendants, William Sizemore and Jeannetta Newberry, in the United States Court for the Western District of Indian Territory, sitting at Wagoner, by filing in the office of the Clerk of said Court his Complaint in Equity, which is in the words and figures following, to-wit:

EXHIBIT A.

27 In the United States Court, Western District, Indian Territory.

No. —. Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JENNETTA NEWBERRY, Defendants.

Petition for Declaration of Heirship and for Partition of Real Estate.

To the Honorable Louis Sulzbacher, Judge of the United States Court for the Western District, Indian Territory:

Your orator Foil M. Brady, the plaintiff, by Thomas & Foreman his attorneys and solicitors, complains of William Sizemore and Jennetta Newberry, the defendants, and for causes of complaint against said defendants alleges the hereinafter stated wrongs and injuries done by the said defendants to and against said plaintiff.

Your orator respectfully represents unto your honor that he is a duly enrolled citizen of the Creek Nation; that he resides near Wagoner, Indian Territory; that the defendant, William Sizemore, is a resident of Wagoner, Indian Territory, but is at present a prisoner serving a penal sentence in the United States penitentiary at Fort Leavenworth, Kansas; that the defendant, Jennetta Newberry, is a resident of the Western District, Indian Territory, her post office address being Oktaha, Indian Territory; that this action is

in relation to the title and ownership of certain tracts of land situate, lying and being in the 7th Recording District of the Western District, Indian Territory, within the jurisdictional limits of the United States Court at Wagoner.

Your orator further represents unto your honor that in his life time one Ellis Grayson, of Wagoner, Indian Territory, was a duly enrolled citizen of the Creek Nation; that on or about the 1st day of March, 1901, the said Ellis Grayson, at the age of nineteen years, departed this life; that on the 23rd day of August, 1902, the Commission to the Five Civilized Tribes, issued to the heirs of said Ellis Grayson, a certificate of Selection for the following described land as his, the said Ellis Grayson's proportionate share of the lands
28 of the Creek Nation, to-wit: The Northwest quarter of the Southwest quarter of Section Thirteen (13) Township Seventeen (17) North, Range Seventeen (17) East, and the South-East quarter of the North West quarter and Lots one (1) and Two (2) of Section Nin-teen (19) Township Seventeen (17) North, Range Eighteen (18) East, containing in all 163.60 acres.

That on the 13th day of June, 1905, General Pleasant Porter, as Principal Chief of the Creek Nation, delivered to your orator as the legal heir of said Ellis Grayson, deceased, deeds or patents to said lands, which said deeds or patents had been theretofore on the 25th day of April, 1904, duly approved by Ethan A. Hitchcock, Secretary of the Interior, copies of which said deeds or patents are hereto attached marked Exhibit A, and Exhibit B, and are hereby made a part of this bill of complaint.

Your orator further represents unto your honor that when the said Ellis Grayson departed this life he left him surviving neither child nor children, nor the descendants of child or children, neither father nor mother, nor brother or sister, but that he left him surviving as his only heirs at law your orator, Foil M. Brady, who was his first cousin on the paternal side, and the defendants William Sizemore and Jennetta Newberry, who were his remote cousins on the maternal side.

That by virtue of your orator's close kinship by blood to the said Ellis Grayson, and by virtue of the Statute in such case made and provided, he, your orator, upon the death of said Ellis Grayson became and is his sole heir at law and was and is entitled to have the legal title to said above described lands vested in him.

That notwithstanding the remote kinship of the said William Sizemore and Jennette Newberry to the said Ellis Grayson, they each claim to be the legal owner by inheritance of an undivided one-half interest in said homestead and allotment of said Ellis Grayson and deny the rights of your orator to any portion of said land.

In consideration of the premises and as your orator is without remedy save in this honorable Court where such matters are properly cognizable, he prays for right and justice, and to that and
29 makes the said William Sizemore and Jennetta Newberry, parties defendant to this action; prays for the usual process of this honorable Court to be directed to the United States Marshal for the Western District, Indian Territory, commanding him to

summon the said defendants William Sizemore and Jennette Newberry, to be and appear before this honorable Court on a day to be fixed by the Court—as the law directs—and that then and there they, the said defendants, be required to full, true and perfect answers make to this, your orator's complaint.

That upon a final hearing of this case, the evidence sustaining the allegations herein contained, your honor will be pleased to find, order adjudge and decree, as follows:

First. That Ellis Grayson was in his life time, a duly enrolled citizen of the Creek Nation, and that as such citizen he was entitled to an allotment of land in the Creek Nation.

Second. That there was allotted to the heirs of said Ellis Grayson deceased, by the Commission to the Five Civilized Tribes, as his, Ellis Grayson's proportionate share of the lands of the Creeek Nation, the lands herein above described, and that duly and legally executed and approved deeds of patents to said lands were delivered to your orator as the legal heir of said Ellis Grayson, by General Pleasant Porter as the Principal Chief of the Creek Nation.

Third. That you orator, Foil M. Brady, is by inheritance, the sole heir to, and the legal owner of, each and all of said tracts of land.

But if, upon the final trial of this cause, it should be determined by the Court that the said defendants, as well as your orator, are heirs to and by inheritance own an interest or interests in said land, then and in that case your orator prays that your honor will—in compliance with the statutes in such case made and provided—nominate and appoint three legally and properly qualified commissioners, to appraise and to partition said land among said heirs according to their respective legal interest therein, provided said land can be divided without serious detriment and loss to said heirs; but, if upon examination said Commissioners find that said land cannot without serious loss be divided and partitioned among said heirs, and that it is to the best interest of said heirs that said land be sold and the proceeds divided among the heirs, then and in that case your orator prays that, by proper decree of this honorable Court, said land be directed to be sold—as the law requires, and that the proceeds arising from such sale of said land be divided and paid to the respective heirs of said Ellis Grayson, deceased, as his or her interest therein may appear.

And your orator prays that your honor will grant unto him such other and further relief in the premises as right and justice demands, and as to your honor may seem meet; and in duty bound he will ever pray.

THOMAS & FOREMAN,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

Foil M. Brady, being first duly sworn on oath, deposes and says that he is the petitioner in the foregoing petition; that he has read

the same and knows the contents thereof, and that the matters and things therein alleged and set forth are true as he verily believes.

FOIL M. BRADY.

Subscribed and sworn to before me this 14th day of June, 1905.

[SEAL.] JAY P. FARNSWORTH,

Notary Public.

My commission expires August 16th, 1908.

31 Attached to the foregoing complaint is the plaintiff's Exhibit "A" therein referred to, a copy of the homestead deed to the heirs of Ellis Grayson, and plaintiff's Exhibit "B" therein referred to, a copy of the allotment deed to the heirs of Ellis Grayson, which said Exhibits are in the words and figures following: to-wit:

32 EXHIBIT "A."

Copy.

Homestead Deed to Heirs No. 27244, *Creek Indian Roll No.* 7859.

The Muskogee (Creek) Nation, Indian Territory, to all whom these presents shall come, Greeting:

Whereas by the Act of Congress approved March 1, 1901, (31 Stat., 861) agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as herein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead, for which he shall have a separate deed; and

Whereas, it was provided by the act of Congress Approved June 30, 1902, (32 Stat. 500) that the homestead of each citizen shall descend to his heirs or be disposed of as therein provided; and

Whereas, the Commission to the Five Civilized Tribes has found that Ellis Grayson, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been selected as a homestead of said Ellis Grayson, and that said land has been allotted to the heirs of said Ellis Grayson.

Now, therefore, I, the undersigned, the principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the afore-said Act of Congress of the United States have granted and conveyed, and by these presents do grant and convey unto the heirs of the said Ellis Grayson, deceased, all right title, and interest of the Muskogee (Creek) Nation, and of all other citizens of said nation in and to the following described land, viz: The Northwest Quarter of the Southwest Quarter of Section 13, Town-

ship 17 North, and Range 17 East of the Indian Base and Meridian, in Indian Territory, containing 40 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of *a* said acts of Congress.

33 In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this 26th day of March, A. D. 1904.

(Signed) P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior.
Approved April 25, 1904.
(Signed) ETHAN A. HITCHCOCK, *Secretary,*
By OLIVER A. PHELPS, *Clerk.*

Recorded in Book 9, page 65 May 4, 1904.
Commission to the Five Civilized Tribes.
(Signed) T. B. NEEDLES, *Commissioner.* [SEAL]

34 EXHIBIT "B."

Copy.

Allotment Deed to Heirs No. 27245, Creek Indian Roll No. 7859.

The Muskogee (Creek) Nation, Indian Territory, to all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901, (31 Stat. 861) agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as herein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, it was provided by said act of Congress that if a citizen of said tribe has died before receiving his allotment of lands; the lands to which he would be entitled, if living, shall descent to his heirs, and be allotted and distributed to them; and

Whereas, The Commission to the Five Civilized Tribes has found that Ellis Grayson, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said Ellis Grayson.

Now therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of Ellis Grayson, deceased, all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, viz:

The Southeast quarter of the Northwest quarter and Lots (1) and (2) of Section 19, Township 17 North, and Range 18 E. of the Indian Base and Meridian, in Indian Territory, containing 123.60 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Act of Congress, and to the provisions of the act of Congress approved June 30, 1902 (32 Stat. 500).

35 In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the great Seal of said nation to be affixed this — day of March, A. D. 1904.

(Signed) P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior.
Approved April 25, 1904.
(Signed) ETHAN A. HITCHCOCK, *Secretary,*
By OLIVER A. PHELPS, *Clerk.* [SEAL.]

Record in Book "T" Page 65, May 4, 1904.
Commission to the Five Civilized Tribes.
(Signed) T. B. NEEDLES, *Commissioner.*

That said complaint and exhibit are under one cover, and bear the following endorsement upon the back thereof:

No. 1478 Equity. Foil M. Brady, Plaintiff vs. William Sizemore and Jeannetta Newberry, Defendants. Petition for declaration of heirship and for partition of Real Estate. Filed Dec. 8, 1905. R. P. Harrison, Clerk, Western Dist. I. T. Ghomas & Foreman, Muskogee, I. T. Attorneys for Plaintiff.

36 That on the 15th day of March, 1906, a Summons was duly issued out of said Court, and delivered to the Marshal for the Western District, commanding him to summon William Sizemore and Jeannetta Newberry to answer said complaint on the first day of the next April term of said Court, which summons was subsequently, on April 27, 1906, filed in said Court by Leo E. Bennett, United States Marshal for the Western District of Indian Territory, without service upon the defendants, which said Summons, together with the return of the United States Marshal endorsed thereon, and the endorsements, is in the words and figures following, to-wit:

37 *Summons in Equity.*

UNITED STATES OF AMERICA,
Indian Territory, Western District:

The President of the United States of America to the Marshal for the Western District, Indian Territory:

Your are commanded to summon William Sizemore and Jennetta Newberry, to answer in twenty days after the service of this Summons

upon them a complaint in equity filed against them in the United States Court for the Western District, Indian Territory, at Wagoner, by Foil M. Brady, and warn them that upon their failure to answer, the complaint will be taken for confessed, and you will make due return of this Summons on the first day of the next April Term of said Court.

Witness the Honorable Louis Sulzbacher, Judge of said Court, and the seal thereof, at Wagoner, Indian Territory this 15th day of March, A. D. 1906.

[SEAL.]

R. P. HARRISON, *Clerk.*
By J. L. SPANSLER, *Deputy.*

Marshal's Return.

UNITED STATES OF AMERICA,
Indian Territory, Western District:

I received this summons on the 21st day of March, 1906, at 10 o'clock A. M.

And the persons named in this summons are "not found in this district".

LEO. E. BENNETT, *U. S. Marshal,*
By DAVID ADAMS, *Deputy.*

(Endorsed:) No. 1478. Summons in Equity. Foil M. Brady vs. William Sizemore, et al. Returned and filed Apr. 27, 1906, By R. P. Harrison, Clerk, Western Dist. I. T. Thomas & Foreman, Attorneys for Plaintiff.

38 That afterward, on December 1st, 1906, the defendants William Sizemore and Jeannette Newberry, filed herein a waiver of the issue and service of summons, and entry of their appearance, which waiver and entry, together with the endorsement thereon, is in the words and figures following, to-wit:

39 In the United States Court for the Western District of Indian Territory, December Term, 1906, Sitting at Wagoner.

No. 1478. Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE, JENNETTA NEWBERRY, Defendants.

Petition for Declaration of Heirship and for Partition.

And now come the said defendants William Sizemore and Jennetta Newberry, and waiving the issue and the service of summons in the above entitled case enter their appearance therein. This entry of appearance is made for the purpose of saving costs and in order that

the final settlement of the matters in controversy may be speedily settled.

Signed and sealed at Muskogee, Indian Territory, this 11th day of June, 1906.

WILLIAM SIZEMORE. [SEAL.]
JENNETTA NEWBERRY. [SEAL.]

Witness to signature:
J. P. FARNSWORTH.

(Endorsed:) No. 1478 Equity. Foil M. Brady, Plaintiff, vs. William Sizemore and Jennetta Newberry, Defendants Petition for declaration of heirship and for partition. Defendants' entry of appearance. Filed Dec. 1, 1906, R. P. Harrison, Clerk, Western Dist. I. T. Thomas & Foreman, Attorneys for Plaintiff.

40 That afterward, on Wednesday, December 12, 1906, being one of the regular term days of said Court, the Court entered the following order in said cause:

WEDNESDAY, *December* 12, 1906.

Eq. 1478.

FOIL M. BRADY
vs.
WILLIAM SIZEMORE et al.

This day it appearing to the Court that on June 11, 1906, defendants waived service and filed their appearance herein and now failing to answer or plead, default is ordered to be taken against them, and the same is hereby entered herein of record and now this cause is referred to the Master.

41 That afterward, on January 21, 1907, the following stipulation was filed herein:

At Wagoner.

No. 1478. Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE et al., Defendants.

It is hereby stipulated that the defendants may if they see fit within a reasonable time—not more than 30 days; introduce before the Master in Chancery such proper testimony as they may have touching their heirship, rights and interests in the land in controversy in this suit the same as if an answer had been filed by them.

Dated Wagoner, Ind. Ter. January 21st, 1907.

THOMAS & FOREMAN,
Attorneys for Plaintiff.
SEAVER & HALFHILL,
Attorneys for Defendants.

which stipulation bears the following endorsements:

No. 1478. Foil M. Brady Plff. vs. William Sizemore et al. Stipulation. Filed Jan. 21, 1907. R. P. Harrison, Clerk, Western Dist. I. T.

42 That afterwards, on October 19, 1907, Thomas A. Sanson, Master in Chancery, to whom this cause was referred, filed herein his report of the testimony, findings of fact, conclusions of law, and recommendations, accompanied by a transcript of the testimony submitted before him, all of which is in the words and figures following, to-wit:

43 In the United States Court of the Indian Territory, Western District, at Wagoner.

No. 1478. Equity.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JENETTA NEWBERRY, Defendants.

Master's Report.

To the Honorable Louis Sulzeacher, Judge of said Court:

Comes now Thomas A. Sanson, Master in Chancery of this Court to whom the above entitled cause was heretofore referred to take the proof and report his findings of fact and conclusions of law and begs leave to make the following report:

I.

The plaintiff filed his bill of complaint in this cause on December 9, 1905, in which in substance it is alleged that the parties are all residents of this District; that the plaintiff is a member and citizen of the Creek Indian Tribe or Nation; that one Ellis Grayson, a duly enrolled citizen of the Creek Nation departed this life on the 1st day of March, 1901, that on the 23rd day of August, 1902; the Commission to the Five Civilized Tribes issued to the heirs of the said Ellis Grayson, a certificate of selection for the following described land located in the Creek Nation, Western District, Indian Territory, to-wit: The Northwest quarter of the Southwest quarter of Section 13, Township 17 North, Range 17 East, and the Southwest quarter of the Northwest quarter and Lots 1 and 2 of Section 19, Township 17 North, Range 18 East, containing 163.30 acres; that on the 13th day of June, 1905, General Pleasant Porter as Principal Chief of the Creek Nation, delivered to the Plaintiff as legal heir of the said Ellis Grayson, deceased, deeds or patents to the said lands, which said deeds or patents had been theretofore on the 25 day of April, 1904, duly approved by the Secretary of the In-

terior copies of said deeds or patents being attached to the plaintiff's bill of complaint.

44 Plaintiff further alleges that the said Ellis Grayson departed this life leaving surviving him neither child nor children, nor descendants of child or children, nor father nor mother, nor brother or sister and that he left him surviving as his only heir at law your orator, Foyl M. Brady, who was his first cousin on the paternal side and the defendants, William Sizemore and Jeannetta Newberry who were remote cousins on the maternal side; that the defendants claim to be the legal owners by inheritance of said lands and deny the rights or your orator to any portion of said land, and praying the Court to adjudge the plaintiff, Foyl M. Brady to be the sole heir at law and the legal owner by inheritance of the said above described lands.

The plaintiff also prays that in case the Court should determine the defendants have an interest in said lands, that the interest of the parties be determined by the Court and said lands be partitioned and divided; in case a partition thereof can be made without manifest injury and if not, the lands be sold and the proceeds of the sale be divided amongst the parties according to their respective interests.

Upon this bill of complaint writs of summons were issued to the defendants returnable at the April, 1906, term of this Court, but were returned unserved, as the defendants voluntarily appeared herein and waived the issuance and service of the writs of summons.

II.

This cause came on for hearing before me at Wagoner in this District on December 12, 1906 after due notice to the parties and again at my office in Muskogee in this District on February 19, 1907, after due notice to the parties, the plaintiff appearing in person and by his attorney and the defendants appearing by their attorney and the following witnesses were produced and sworn and their testimony reduced to writing is attached hereto and made a part of this report:

On behalf of the plaintiff, Foyl M. Brady, plaintiff, Wagoner, I. T., Esther Simmons, Inola, I. T.

On behalf of the defendants, Jeannetta Newberry, defendant.

From all of the evidence introduced in this cause I find
45 the facts to be as follows:

Findings of Fact.

1. I find that Ellis Grayson was a duly enrolled member and citizen of the Creek Indian Tribe or Nation of Indians and that he was entitled to an allotment as such and that he departed this life in the Creek Nation on the 1st day of March, 1901, leaving surviving him neither child nor children nor the descendants of child or children, nor father nor mother, nor brother nor sister or their descendants but that he left surviving him as his nearest of kin the

plaintiff, Foyl M. Brady and the defendants William Sizemore and Jeannetta Newberry.

2. I find that after the death of the said Ellis Grayson and in pursuance of a treaty made and entered into between the Creek Nation and the United States that there was issued to the heirs of the said Ellis Grayson, deceased, a certificate of selection to the lands described in the plaintiff's bill of complaint and that thereafterwards, to wit: on the 26 day of March, 1904, there was executed by the Principal Chief of the Creek Nation, deeds or patents to the said lands to the heirs of the said Ellis Grayson, deceased, and that the same were delivered to the plaintiff, Foyl M. Brady.

3. I find that the said deeds or patents were approved by the Honorable Secretary of the Interior on April 25, 1904.

4. I find that the plaintiff Foyl M. Brady is now and has been since the issuance and delivery of the said patents, in possession of the said land.

5. I find that the plaintiff Foyl M. Brady is and was at the time of the death of the said Ellis Grayson, a cousin of the said Ellis Grayson and that the plaintiff Foyl M. Brady's mother was a sister of the father of the said Ellis Grayson, deceased.

6. I find that the defendants William Sizemore and Jeannetta Newberry are and were first cousins of the said Ellis Grayson on their mother's side and third cousins to the said Ellis Grayson on their father's side.

46 7. I find that the plaintiff Foyl M. Brady and the defendants William Sizemore and Jeannetta Newberry are and were all first cousins of the said Ellis Grayson, deceased, and were and are all related to him within the same degree.

8. I find that at the time of the death of the said Ellis Grayson that the Creek law of descent was in force in the Creek Nation, Western District of the Indian Territory, and that the said land of the said Ellis Grayson, descended according to the law of descent of the Creek Nation.

I find that the law of descent of the Creek Nation at the time — death of the said Ellis Grayson was as follows:

"Be it further enacted that if any person die without a will having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property." Laws of the Muskogee Nation of 1880, page 132, section 6.

I find that the said Ellis Grayson died intestate.

III.

Conclusions of Law.

From all of the evidence in this cause and the foregoing findings of fact I conclude that the plaintiff, Foyl M. Brady and the defendants William Sizemore and Jeannetta Newberry are each entitled as the nearest of kin of the said Ellis Grayson, deceased, to an undivided one-third interest in and to the said land by inheritance.

Recommendations.

I therefore recommend that the court make and enter a decree herein declaring *that* the said plaintiff, Foyl M. Brady and the said defendants, William Sizemore and Jeannetta Newberry to be the sole heirs at law of the said Ellis Grayson, deceased, and as such each entitled to an undivided one-third interest in and to all of the lands involved in this suit.

And that the Court appoint three persons qualified as required by law, who having taken the oath required by law shall go upon said lands and divide and partition the same amongst the said parties according to their respective interests, giving to each party
47 one-third of the said land in value and having made such partition that they be directed to file their report giving the exact metes and bounds of the land set off to each party and file a map therewith.

And in case the said commissioners so appointed shall report that the said land cannot be partitioned and divided amongst the said parties without manifest injury to one or all of them, that then and in that event the said lands be ordered sold and the proceeds of said sale be divided amongst the said parties according to their respective interests.

I recommend that the costs of this suit be borne equally by the parties to it, each party being ordered and required to pay one-third of all the costs.

I respectfully ask the Court to allow me the sum of $50.00 for services rendered herein, one-third of which is to be paid by each of the parties and taxed as costs.

All of which is respectfully submitted.

THOMAS A. SANSON,
Master in Chancery.

Dated July 27, 1907.

$33.35 of Master's fee paid by the defendant Jennetta Newberry.

THOMAS A. SANSON, *Master.*

48 In the United States Court in the Indian Territory, Western District, at Wagoner.

No. 1478. Equity.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

WAGONER, INDIAN TERRITORY, *December* 12, 1906.

Testimony Taken before Thomas A. Sanson, Master in Chancery, the Plaintiff Appearing in Person, and by Judge John R. Thomas, His Attorney, the Defendants Making no Appearance.

FOYL M. BRADY, plaintiff, being first duly sworn, testified as follows:

Direct examination by Judge THOMAS:

Q. State your name.
A. Foyl M. Brady.
Q. Your age.
A. Fifty, born in 1856.
Q. Your Post office Address?
A. Wa-oner.
Q. Your business?
A. Farming.
Q. Are you acquainted with the defendants, William Sizemore and Jeannetta Newberry?
A. Yes sir.
Q. Are you related to them?
A. Yes sir, distantly related.
Q. To which one of the Five Civilized Tribes do you belong?
A. To the Muskogee.
Q. To the Muskogee or Creek Tribe?
A. Yes sir.
Q. At the time this suit was filed do you know where the defendant William Sizemore was?
A. Yes sir, he was in Okmulgee.
Q. At the time this suit was filed?
A. Yes, sir.
Q. You state in your bill that he was in the penitentiary at Fort Leavenworth?
A. Yes sir, that is right.
Q. He has since been released, however?
A. Yes sir.
Q. This suit is in relation to a tract of land that lies in this Recording District.
A. Yes sir.

—. Did you know Ellis Grayson in his lifetime?
A. Yes sir.
Q. Is Ellis Grayson living or dead?
A. He is dead.
Q. Can you tell when he died?
A. He died somewhere near 1900.
Q. You allege here that Ellis Grayson departed this life on or about the first day of March 1901. Is that when it was?
A. Yes, sir.
Q. To which one of the tribes, if either, did he belong?
A. Creek.
Q. Was he a duly enrolled citizen of the Creek Tribe of Indians?
A. Yes sir, I enrolled him.
Q. Did you select his allotment for him?
A. Yes sir.
Q. You describe the Northwest quarter of the Southwest quarter of Section 13, Township 17 North, Range 17 East and the Southeast quarter of the Northwest quarter and lots one and two of section 19 Township 17 North, Range 18 East, containing in all 163.60 acres. Was that the land selected by you for him?
A. Yes sir.
Q. You allege in your bill that on the 13th day of June, 1905, General Porter as Principal Chief of the Creek Nation, delivered to you a deed to the land in controversy?
A. Yes sir.
49 Q. It was a deed to the heirs?
A. Yes sir.
Q. A deed or patent to the heirs of Ellis Grayson, deceased?
A. Yes sir.
Q. Are you related to Ellis Grayson?
A. Yes sir.
Q. What relationship was there?
A. I was about first cousin by his father — was my uncle.
Q. Was your father his father's brother or your mother his mother's sister, or how was it? What was Ellis Grayson's father's name?
A. Ellis Grayson and the Indian name was Spa-ca-che.
Q. What was your father's name?
A. Sam R. Brady.
Q. Are you related to him on your mother's side or father's side?
A. Mother's.
Q. What was your mother's name?
A. Eliza.
Q. What relation was your mother to Ellis Grayson's father?
A. They were brothers and sisters.
Q. Was Ellis Grayson married at the time of his death?
A. No sir.
Q. He never had been married?
A. No sir.
Q. Did he leave either a wife or child or children or the descendants of child or children?

A. No sir.
Q. Was your mother a duly enrolled Creek citizen?
A. Yes sir.
Q. Was Ellis Grayson's father a duly enrolled citizen of the Creek Nation?
A. Yes sir.
Q. Then you say you are a first cousin to Ellis Grayson through your mother?
A. Yes sir.
Q. Are you acquainted with William Sizemore and Jeannetta Newberry?
A. Yes, sir.
Q. Were they related to Ellis Grayson?
A. Yes sir.
Q. In what way were they related to him?
A. They were two sister's children to Ellis Grayson. The mothers was two sisters.
Q. Their mother was the sister of Ellis Grayson?
A. Yes sir.
Q. Did they both have the same mother?
A. Yes sir.
Q. Your mother was what?
A. She was no relation.
Q. Your father then was a brother of the mother of Ellis Grayson?
A. I was related on Ellis Grayson's father's side.
Q. What relation was Ellis Grayson's father to you?
A. He was my uncle.
Q. Was he your father's brother or your mother's brother?
A. My mother's brother.
Q. What was your mother's name?
A. Eilza Brady.
Q. What was her name before she was married?
A. I don't know. They had Indian names.
Q. Don't you remember her Indian name?
A. No sir.
Q. She was the sister of Ellis Grayson's father?
A. Yes sir.
Q. What was your mother's father's name?
A. I don't know.
Q. He was a Grayson wasn't he?
A. No sir he just got the name by going to school.
Q. What was his Indian name?
A. Spa-cache.
Q. Was Jeannetta Newberry and William Sizemore's mother a sister of Ellis Grayson?
A. Ellis Grayson's mother was a sister to William Sizemore's and Jeannetta Newberry's mother.
Q. Your mother was a sister of the father of Ellis Grayson?
A. Yes sir.

Q. And William Sizemore and Jeannetta Newberry's mother was——

A. Sister to Ellis Grayson's mother.

Q. Do you know what Ellis Grayson's mother's name was before she was married?

A. Mary Ann Perryman.

Q. So these defendants claim through a sister of the mother of Ellis Grayson?

A. Yes sir.

Q. Do you know of any other heirs at all or persons claiming this estate as heirs or kinsmen?

A. No sir.

Q. State whether or not you claim to be the sole heir of Ellis Grayson to this property?

A. I expect I would be the nearest heir.

Q. You claim that, do you?

A. Yes sir.

Q. Who has possession of this land?

A. I have possession?

Witness excused.

50 ESTHER SIMMONS, a witness on behalf of the plaintiff, be- first duly sworn, testified as follows:

Direct examination by Judge THOMAS:

Q. What is your name?

A. Esther Simmons.

Q. What is your postoffice?

A. Inola.

Q. What is your age?

A. About 53.

Q. Are you acquainted with the plaintiff, Foyl M. Brady?

A. Yes sir.

Q. Are you acquainted with the defendants, William Sizemore and Jeannetta Newberry?

A. Yes sir.

Q. Are you related to either one of them or all of them?

A. Yes sir.

Q. What relation are you to the plaintiff, Foyl M. Brady?

A. Brady is Mamma's cousin.

Q. Foyl M. Brady is your mother's cousin?

A. Yes sir.

Q. Are you related to William Sizemore and Jeannetta Newberry?

A. Yes sir, that is my brother's children.

Q. What was the name of your brother?

A. Davis Sizemore.

Q. Your name before you were married was Sizemore?

A. No sir, half sister.

Q. What was your name before you were married?

A. Collins.
Q. Were you acquainted with the mother of Foyl M. Brady?
A. Yes sir.
Q. What was her name?
A. Eliza.
Q. Do you know whose daughter she was?
A. I don't know that.
Q. You didn't know Spa-ca-che?
A. I know him.
Q. Was he the father of Eliza?
A. No sir, she was sister to Spa-ca-che.
Q. Who was sister to Spa-ca-che? Brady's mother?
A. Yes sir.
Q. Whose children were William Sizemore and Jeannetta Perrymann?
A. Illinois Perryman.
Q. What relationship did she bear to Ellis Grayson? Was she any blood kin to him?
A. Yes sir.
Q. Ellis Grayson was the father of William Sizemore and Jeannetta Newberry?
A. Cousin of Jeannette and William.
Q. You mean he was a cousin on the mother's side?
A. Yes sir.
Q. He was not a cousin on the father's side?
A. Yes sir, both. Spa-ca-che my aunt's son and Jeannette her father is my brother. They were both.
Q. One was cousin on one side and the other on the other?
A. Yes sir, each other, Jeannetta's father and Spa-ca-che cousins.
Q. Foyl M. Brady was a cousin on the father's side? He was a cousin to Ellis Grayson on the father's side, wasn't he?
A. Yes sir.
Q. William Sizemore and Jennetta Newberry were cousins on the mother's side?
A. On both sides, Yes sir.
Q. How could that be?
A. It's my cousin Ellis's father is her cousin.
Q. Spa-ca-che the cousin of Illinois Perryman?
A. No sir, Spa-ca-che and my mother cousins and those children's mothers both two sisters.
Q. Jeannetta Newberry's mother and William Sizemore's mother were two sisters?
A. No sir.
Q. Didn't they have the same mother?
A. No, sir. Two sisters' children. May Ann is Ellis's mother.
Q. But William Sizemore and Jeannetta Newberry had the same mother?
A. Yes sir, same father and same mother.
Q. Foyl M. Brady's mother was a sister of Spa-ca-che?
A. Yes sir.
A. Spa-ca-che was the father of Ellis Grayson?

A. Yes sir.
Q. William Sizemore's and Jeannetta Newberry's mother was?
A. Illinois Perryman.
Q. Who was their father?
A. My brother.
Q. What was his name?
A. Dave Sizemore, and his mother before she married was a Perryman.
51 Q. Then she was not related by blood to Foyl M. Brady's mother?
A. No sir.
Q. Ellis Grayson's father was Spa-ca-che?
A. Yes sir.
Q. And his mother was May Ann?
A. Yes sir.
Q. What was Jeannetta's mother's name?
A. Illinois.
Q. Was she a daughter of Spa-ca-che?
A. No sir, Mary Ann's sister.
Q. Illinois married whom?
A. Dave Sizemore.
Q. These two children William Sizemore and Jeannetta Newberry were the children of Dave Sizemore and Illinois?
A. Yes sir.
Q. Who was Foyl M. Brady's mother?
A. Eliza.
Q. What relation was Eliza to Spa-ca-che?
A. His sister.
Q. Was she a sister of Mary Ann?
A. No sir.
Q. Foyl M. Brady is a son of Eliza and Sam Brady?
A. Yes sir.
Q. Illinois was a sister of Spa-ca-che?
A. No sir.
Q. Whose daughter was she?
A. Her father's name was Jim Perryman.
Q. Was Days Sizemore any relation to Spa-ca-che?
A. Yes sir.
Q. What relation was he?
A. Mamma's cousin. Spa-ca-che was mamma's cousin.
Q. What relation was Illinois to Spa-ca-che?
A. I don't know.
Q. What relation was Dave Sizemore to Spa-ca-che?
A. I don't know. Mamma always called him cousin.
Q. Did they belong to the same clan?
A. No sir.
Q. They were cousins by blood?
A. I guess so.
Q. It came on the side of Dave Sizemore, Dave Sizemore was a cousin of Spa-ca-che?
A. Yes sir.

Q. And Foyl Brady is a nephew of Spa-ca-che?
A. Yes sir.
Q. Foyl M. Brady is the son of Eliza and Sam Brady and Eliza was the sister of Spa-ca-che?
A. Yes sir.
Q. William Sizemore and Jeannetta Newberry are the children of Dave Sizemore and Illinois?
A. Yes sir.
Q. And Dave Sizemore was a cousin of Spa-ca-che?
A. Yes sir.
Q. Ellis Grayson is the son of Spacache and Mary Ann?
A. Yes sir.
Q. Do you know who was the closer kin to Ellis Grayson, Foyl Brady or William Sizemore and Jeannetta Newberry?
A. No sir.
Q. Which was the closer kin?
A. I don't know. Sister's children. Both just the same I think.
Q. Ellis Grayson was the son of Mary Ann and Spa-ca-che?
A. Yes sir.
Q. And William Sizemore and Jeanneta Newberry are the children of Illinois and Dave Sizemore?
A. Yes sir.
Q. Mary Ann and Illinois were sisters?
A. Yes sir.
Q. They were not related by blood to Spa-ca-che? They were only related by marriage. That is Mary Ann was related as his wife?
A. Yes Sir.
Q. They were not kin folks?
A. No sir.
Q. Then the father of Ellis Grayson, Spa-ca-che, and the father of William Sizemore and Jeannetta Newberry were cousins?
A. Yes sir.
Q. The mother of William Sizemore was a sister of Spa-ca-che?
A. Yes sir.
Q. Spa-ca-che was the husband of Mary Ann?
A. Yes sir.
Q. Foyl M. Brady is the son of the sister of Spa-ca-che who was the father of Ellis Grayson, deceased. William Sizemore and Jeannetta Newberry are the children of Dave Sizemore and Illinois Perryman. Dave Sizemore was a cousin of Spa-ca-che, the father of Ellis Grayson. In other words, Foyl M. Brady is the nephew of Spa-ca-che, the father of Ellis Grayson, and William Sizemore and Jeannetta Newberry and the children of Dave Sizemore, who was a remote cousin of Spa-ca-che. That is right, is it?
A. Yes sir.

Witness excused.

52 In the United States Court in the Indian Territory, Western District at Wagoner.

No. 1478, Equity.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

MUSKOGEE, INDIAN TERRITORY, *February* 19, 1907.

Testimony before Thomas A. Sanson, Master in Chancery, the Plaintiff Appearing by Judge John R. Thomas and the Defendants Appearing by Messrs. Seavers & Halfhill, their Attorneys.

JEANNETTA NEWBERRY, defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HALFHILL:

Q. State your name?
A. Jeannetta Newberry.
Q. How old are you?
A. 32.
Q. What relation are you to William Sizemore?
A. Sister.
Q. What was your mother's name?
A. Illinois Peryman.
Q. What was your father's name?
A. David Sizemore.
Q. Do you know Foyl M. Brady, plaintiff?
A. I do.
Q. What was his mother's name?
A. Eliza.
Q. Elica who?
A. Brady.
Q. What was his father's name?
A. Sam Brady.
Q. What relation was your mother and Brady's mother?
A. None.
Q. What relation are you to Brady, Foyl M.?
A. Cousin distant.
Q. What do you mean by distant?
A. He was a cousin to my father which would make us distant cousins.
Q. He was a cousin to your father?
A. Yes sir.
Q. Did you know during his lifetime Ellis Grayson?
A. Yes sir.
Q. What age was he when he died?
A. About 21.

Q. What was his father's name?
A. Elliott Grayson.
Q. What was his mother's name?
A. Mary Ann Perryman.
Q. What relation was he, Ellis Grayson, to Foyl M. Brady?
A. He was a cousin on his father's side.
Q. When you say his father's side what do you mean? Whose father's side?
A. Ellis Grayson was a cousin to Brady on his uncle's side.
Q. You are a Creek Citizen, are you and on the roll?
A. I am.
Q. What was Ellis Grayson's mother's name before she was married?
A. Mary Ann Perryman.
Q. What relation was she to Foyl M. Brady?
A. She was aunt by marriage.

Cross-examination by Judge THOMAS:

Q. Ellis Grayson's father was named Specache?
A. Yes, sir.
Q. And his mother's name was Mary Ann?
A. Ellis Grayson's mother's name was Mary Ann.
Q. That's what I say.
A. Yes sir.
Q. Foyl Brady's mother was named Eliza?
A. Yes sir.
Q. And she was a sister of Spacache?
A. Yes sir.
Q. Your father, Dave Sizemore, was a cousin of Spacache?
A. Yes sir.
Q. And you are a second cousin of Spacache naturally?
A. Yes sir.

53 Objected to. Objection overruled. Exception.

Q. And you are a third cousin of Ellis Grayson?
A. Yes sir, but on my mother's side I would be first cousin.

Objected to. Objection overruled. Exception.

Q. Ellis Grayson and Foyl M. Brady were first cousins on his father's side?

Objected to, incompetent, immaterial and irrelevant because the foundation has not been laid.
Objection overruled. Exception.

Q. And Foyl M. Brady and Ellis Grayson were first cousins on the father's side?
A. Spacache was William Brady's uncle and Ellis Grayson was Spacache's son; that would make them cousins some way.
Q. Foyl M. Brady's father was Sam R. Brady?
A. Yes sir.
Q. Wasn't Foyl M. Brady's mother Eliza?

A. Yes sir.
Q. And were not Eliza and Sam R. Brady man and wife?
A. Yes sir.
Q. The land in controversy was the allotment of Ellis Grayson was it not?
A. Yes sir.

Witness excused.

Case closed.

And said Master's report was endorsed as follows:
No. 1478, Equity. Foyl M. Brady, Plaintiff, vs. William Sizemore and Jeannetta Newberry, Defendants. Master's report. Filed Oct. 19, 1907, R. P. Harrison, Clerk, Western Dist. I. T., Thomas A. Sanson, Master in Chancery.

54 That afterward, on October 26, 1907, the Plaintiff filed herein his exceptions to the Master's Report, which exceptions together with the endorsements thereon, are in the words and figures following, to-wit:

55 In the United States Court for the Western District of the Indian Territory, at Wagoner.

No. 1478, Equity.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JENNETTA NEWBERRY, Defendants.

Exceptions to Master's Report.

Exceptions taken by Foyl M. Brady, the above named plaintiff, to the report of Thomas A. Sanson, Esq., the Master in Chancery, to whom this cause stands referred, and which report was filed in the office of the Clerk of this Court on the 19th day of October, 1907.

First Exception. For that the said Master in his said report found, in the first paragraph of his finding of fact:
"That Ellis Grayson departed this life on the 1st day of March, 1901. That he left surviving him as his nearest of kin the plaintiff Foil M. Brady, and the defendants, William Sizemore and Jeannetta Newberry."
Whereas, the Master should have found that when said Ellis Grayson died, he left him surviving, as his sole heir at law, the plaintiff Foil M. Brady.
Second Exception. For that the said Master in the second paragraph of his finding of fact in his said report, hath found:
"* * * That after the death of the said Ellis Grayson, and in pursuance of a treaty made and entered into between the Creek Na-

tion and the United States, that there was issued to the heirs of the said Ellis Grayson, deceased, a certificate of selection of lands described in the plaintiff's bill of complaint, and that thereafterwards, to-wit, on the 26 day of March, 1904, there was executed by the Principal Chief of the Creek Nation, deeds or patents to the said lands, as the heirs of the said Ellis Grayson, deceased, and that the same was delivered to the plaintiff, Foil M. Brady."

Whereas, the Master should have found: That after the death of said Ellis Grayson, in pursuance of a treaty made and entered into between the Creek Nation and the United States, there was issued to the heirs of Ellis Grayson, deceased, on the 22nd day of August, 1902, a certificate of selection of the lands described in the
56 plaintiff's bill of complaint; that thereafterwards, to-wit, on the 26th day of March, 1904, the Principal Chief of the Creek Nation executed and delivered deeds or patents, duly approved by the Secretary of the Interior, to the said lands, to the heirs of the said Ellis Grayson, deceased, and that said deeds or patents, were delivered to the plaintiff as the sole legal heir of said Ellis Grayson, deceased.

Third Exception. For that the said Master, in the 6th and 7th paragraphs in his findings of fact, in his said report, hath found:

"I find that the defendants William Sizemore and Jennetta Newberry are, and were first cousins of the said Ellis Grayson, on their mother's side, and third cousins to the said Ellis Grayson on their father's side."

Whereas, the Master should have found that the plaintiff, Foil M Brady, was, and is a first cousin of said Ellis Grayson on his paternal side, and that the defendants, William Sizemore and Jeannetta Newberry were, and are third cousins on the maternal side; and that said plaintiff Foyl M. Brady, and the said defendants, William Sizemore and Jeannetta Newberry were not related to the said Ellis Grayson in the same degree.

Fourth Exception. For that the said Master, in the 8th paragraph of his finding of facts, hath found:

"That at the time of the death of the said Ellis Grayson that the Creek law of descent was in force in the Creek Nation, Indian Territory, and that the said land of the said Ellis Grayson descended according to law of descent of the Creek Nation."

Whereas the Master should have found: That when the certificate of selection for the homestead and allotment of Ellis Grayson, deceased, was issued to his heirs on the 22nd day of August, 1902, and when the deeds or patents for said lands were issued and delivered to said heirs on the 26th day of March, 1904, Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, entitled Descents and Distributions, was in force in the Creek Nation and Indian Territory, and was, and is the only law of descent and distribution governing the descent of the land in question in this case. And that the Creek law of descent was not in force in the Creek Nation at the time said land became a descendable estate.

57 Fifth Exception. For that the said Master hath found in his conclusions of law;

"From all of the evidence in this case, and the foregoing finding of fact, I conclude that the plaintiff, Foil M. Brady and the defendants, William Sizemore, and Jeannetta Newberry are each entitled, as the nearest of kin of the said Ellis Grayson; deceased, to an undivided one-third interest in and to said land by inheritance."

Whereas, the Master should have found that the plaintiff, Foil M. Brady, being a first cousin of Ellis Grayson, deceased, on the paternal side, and his sole heirs at law, is entitled by inheritance to the whole of said land.

Wherefore, the said plaintiff doth except to the said report and appeals therefrom to the judgment and conscience of this Court.

THOMAS & FOREMAN,
Attorneys for Plaintiff.

No. 1478 Equity. Foyl M. Brady, Plaintiff, vs. William Sizemore and Jeannetta Newberry, Defendants. Exceptions to Master's Report by Plaintiff. Western Dist. Ind. Ter. Filed in Open Court October 26, 1907. H. P. Harrison, Clerk, U. S. Court. Thomas & Foreman, Attys. for Plaintiff.

58 And afterward, on October 26, 1907, the Court entered the following order:

SATURDAY, *October* 26, 1907.

Eq. 1478.

FOIL M. BRADY
vs.
WILLIAM SIZEMORE et al.

This day exceptions to the Master's report are filed by permission of the Court. Case to be submitted to the Court for determi-
59 nation.

That afterward, on January 27, 1908, the defendants filed herein their motion to confirm the Master's report, which motion, together with the endorsements thereon, is in the words and figures following, to-wit:

60 In the District Court Within and for the County of Wagoner, State of Oklahoma.

No. 1478, Equity.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Motion to Confirm Master's Report.

Comes now the defendants, William Sizemore and Jeannetta Newberry, and moves the Court to confirm the Master in Chancery's Re

port heretofore made in this case, and which said report is filed herein.

WILLIAM SIZEMORE AND
JEANNETTA NEWBERRY.
By W. D. HALFHILL,
Defendants' Attorney.

No. 1478. Foil M. Brady, Pl'ff, vs. William Sizemore et al. Motion to Confirm Master's Report. Filed in District Court, Wagoner County, Jan. 27, 1908. A. L. Snyder Clerk. W. D. Halfhill, Defendants' Att'y.

61 That afterward, on April 30, 1908, defendants filed herein their exceptions to the Master's report, which exceptions, together with the endorsements thereon, are in the words and figures following, to-wit:

62 In the Dstrict Court within and for the County of Wagoner. State of Oklahoma.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY.

Exceptions to Master's Report.

Exceptions taken to Master's Report, Thomas A. Sanson, Esq., the Master in Chancery, by the above named defendants, William Sizemore and Jeannetta Newberry, which report was filed in the office of the Clerk of this Court on the 19th day of October, A. D. 1907.

First. The defendants and each of them take no exceptions to the Master's report upon his findings of the facts in this case.

Second. That the Master in his said report hath found, in his conclusions of law:

"From all the evidence in this case, and the foregoing finding of facts, I conclude that the plaintiff, Foyl M. Brady, and the defendants, William Sizemore and Jeannetta Newberry, are each entitled as the nearest of kin to said Ellis Grayson, deceased, to an undivided one-third interest in and to said land by inheritance."

Whereas, the said Master should have found that the defendants William Sizemore, and Jeannetta Newberry, being the first cousins of Ellis Grayson, deceased, on the maternal side, and his sole heirs at law, *is* entitled by inheritnace to the whole of said land.

Wherefore, the said defendants doth except to the said report, and appeal therefrom to the judgment of this court.

W. D. HALFHILL,
Defendants' Attorney.

(Endorsed:) No. 1478. Foyl M. Brady, Pl'ff, vs. William Sizemore and Jeannetta Newberry, Def't. Exceptions to Master's Report. Filed in District Court Wagoner County, Okla. Apr. 30, 1908. A. L. Snyder, Clerk. W. D. Halfhill, Def'ts' Attorney.

63 That afterward, on the 9th day of October, 1908, the parties filed herein their stipulation, which stipulation, together with the endorsements thereon, is in words and figures as follows, to-wit:

64 In District Court, Wagoner County, State of Oklahoma.

FOYL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Stipulation.

It is hereby agreed by and between the parties in the above styled cause, that the same may be presented and argued to the Court (upon exceptions filed by both Plaintiff and Defendants to the Master's Report filed herein) at Muskogee, Oklahoma, at such time as may be mutually agreed upon by the attorneys of the respective parties hereto, and the convenience of the Court, and the Order of the Court be entered of record as of this date.

Dated this 9th day of October, 1908.

THOMAS & FOREMAN,
Attorneys for Plaintiff.
W. D. HALFHILL,
Attorney for Defendants.

No. 1478. Foyl M. Brady, Pl'ff, vs. William Sizemore & Jeannetta Newberry, Def'ts. Stipulation. Filed Oct. 9, '08. A. L. Snyder, Clerk.

65 That afterward on January 9, 1909, the Court entered the following Order.

SATURDAY, *January* 9, 1909.

1478.

FOIL M. BRADY
vs.
WILLIAM SIZEMORE et al.

Come now the counsel for the respective parties and present their arguments upon exceptions to Master's Report. And this cause is continued for further hearing.

66 That afterward, on May 7th, 1909, the defendants appeared in Court, and tendered their answer; and asked leave of the Court to file the same. The said answer, together with the endorsements thereon being in the words and figures following, to-wit:

67 In District Court in and for Muskogee County, State of Oklahoma.

No. 1478. Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Answer of Defendants.

Come now the defendants, William Sizemore and Jeannetta Newberry and having first obtained leave of the Court for that purpose, and it appearing that upon the 21st day of January, A. D. 1907, that the defendants were in default for Answer, and that the plaintiff, by his Attorneys Thomas & Foreman, and the defendants, by their attorney W. D. Halfhill, entered into a written stipulation, which is filed herewith in this cause, and which is herewith referred to and made a part hereof, the defendants file this their Answer herein in this cause, and say:

II.

Defendants admit that during the life time of Ellis Grayson, was a duly enrolled citizen of the Creek Nation; that on the 1st day of March, 1901, that the said Ellis Grayson departed this life, that on the 23rd day of August, 1902, the Commission to the Five Civilized Tribes issued to the reirs of Ellis Grayson, deceased, a Certificate of Selection, for the land described in plaintiff's petition, as the proportionate share of Ellis Grayson, in and to the lands of the Creek Nation.

III.

Defendants admit that at the time alleged in Plaintiff's petition the Creek Nation, by its Principal Chief, delivered the deeds or patents to said land, to the heirs of said Ellis Grayson, deceased, duly approved by the Secretary of the Interior, and that the purported copies of said deeds or patents, attached to plaintiff's petition marked Exhibit A. and Exhibit B. are true copies of said
68 deeds or patents.

IV.

Defendants admit that when Ellis Grayson departed this life he left him surviving neither child nor children, nor the decendants of child or children, neither father, nor mother, nor brother or sister.

V.

But defendants deny that the plaintiff Foil M. Brady, is the only heir at law of the said Ellis Grayson, and deny that said Foil M. Brady has any interest whatever in and to the land described in plaintiff's petition filed herein, and deny that he is the sole heir of said Ellis Grayson, deceased, or that he is an heir at all, by reason of his close kinship by blood or otherwise, and deny that he is entitled to have the legal title to said lands vested in him, or any part of the same.

VI.

Defendants aver that they are the legal and only heirs of the said Ellis Grayson, deceased, and own an undivided one-half interest each in and to said land, which was the allotment of the said Ellis Grayson, and that the defendants and each of them were and are First Cousins on the maternal side, and the nearest relation to the said Ellis Grayson deceased, and by law entitled to the whole of said estate, and the lands described in plaintiff's petition.

V-.

Wherefore, defendants pray that this Court may find that the defendants are the sole heirs of Ellis Grayson, deceased, and the nearest relation, and entitled to the lands described in plaintiff's petition, and that the plaintiff Foil M. Brady has no interest whatever in and to said lands, or any part thereof, and for such other and further relief in the premises as the defendants may be entitled to, and that the defendants may recover of and from the plaintiff all costs herein expended in this action, and that they may — decreed the immediate possession of said land.

WILLIAM SIZEMORE AND
JEANNETTE NEWBERRY.
By W. D. HALFHILL, *Att'y.*

69 No. 1478. Foil M. Brady, Pl'ff, vs. William Sizemore and Jeannetta Newberry, Def'ts. Answer of Defendants. W. D. Halfhill, Defendants' Att'y.

70 And thereupon, on the 7th day of May, 1909, the Court announced its findings in favor of the defendants herein, confirmed the Masters' findings of fact, modified his conclusions of law, and directed that judgment be entered for the defendants, as per the decree herein. Whereupon the plaintiff filed his motion for a new trial, which motion is in words and figures following, to-wit:

71 In the District Court of Wagoner County, Oklahoma.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Case Made.

Motion for New Trial.

Comes now the Plaintiff, Foil M. Brady, by his attorneys, Thomas & Foreman, and moves the Court for a new trial herein, and for ground of said motion alleges and shows the following facts.

First. The Court erred in confirming the Master's finding of facts herein.

Second. The Court erred in confirming the finding of the Master that when Ellis Grayson departed this life on March 1, 1901, he left surviving him as his nearest of kin Foil M. Brady, William Sizemore and Jeannetta Newberry, for the reason that the Master should have found that when the said Ellis Grayson died, he left him surviving as his sole heir at law the Plaintiff, Foil M. Brady.

Third. The Court erred in finding that the defendants, William Sizemore and Jeannetta Newberry are the nearest relations of Ellis Grayson, deceased, and are the sole heirs at law, and entitled by inheritance to the whole of the land described in plaintiff's petition.

Fourth. The Court erred in finding that the plaintiff Foil M. Brady, has no right or valid claim or title to said land, or any part thereof, nor any interest whatever in said land, or any part thereof.

Fifth. The Court erred in decreeing that the title to the land involved herein be quieted, and found to be in the defend-
72 ants, William Sizemore and Jeanetta Newberry, and that the plaintiff, Foil M. Brady, be forever and perpetually enjoined from setting up or asserting any title or interest in and to the lands involved herein adverse to the interest and title of the defendants, William Sizemore and Jeannetta Newberry.

Sixth. The Court erred in decreeing that the costs of this suit be ıxed against the plaintiff, Foil M. Brady.

Seventh. The Court erred in finding that at the time of the death of Ellis Grayson the Creek law of descent was in force in the Creek Nation, Indian Territory, and that the said land of the said Ellis Grayson descended according to the law of descent of the Creek Nation, for the reason that the Court should have found that when the certificate of selection for the homestead and allotment of Ellis Grayson, deceased, was issued to his heirs on the 22nd day of August, 1902, and when the deeds or patents of said land were issued and delivered to his said heirs on the 26th day of March, 1904, Chapter 49, Mansfield's Digests of the statutes of Arkansas, entitled "Descents and Distributions" was in force in the Creek Nation and Indian

Territory, and was and is the only law of descent and distribution covering the descent of the land in question in this case. And that the Creek law of descent was not in force in the Creek Nation at the time said land became a descendible estate.

Eighth. The Court erred in not finding that the plaintiff, Foil M. Brady, being a first cousin of Ellis Grayson, deceased, on the paternal side, and his sole heir at law, is entitled by inheritance to the whole of said land.

Ninth. The Court erred in finding and decreeing any rights whatever to the defendants William Sizemore and Jeannetta Newberry.

Tenth. The court erred in basing a decree finding the rights of the defendants, because said decree is not supported by proper or competent testimony.

In consideration of the premises, therefore, the plaintiff prays that the judgment and decree of this Court be set aside, and the plaintiff be awarded a new trial.

THOMAS & FOREMAN,
Attorneys for Plaintiff.

73 Whereupon, on the 7th day of May, 1909, the Court heard the plaintiff's motion for a new trial and overruled the same, to which the plaintiff excepted, and his exception was noted and allowed.

74 Whereupon the plaintiff prayed an appeal which was granted, and he was given sixty (60) days to prepare and serve the Case Made and Ten (10) days were allowed the defendants to suggest amendments, and the same to be settled on five (5) days' notice of either party, all of which is in the decree of the Court entered on the 5th day of May, 1909, which decree, with the endorsements thereon, is in the words and figures following, to-wit:

75 In the District Court Within and for the County of Wagoner, State of Oklahoma.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Decree of Court.

This day this cause came on to be heard upon the exceptions of the Plaintiff to the report of the Master in Chancery, and also upon the exceptions of the defendants, to the conclusions of law, of the report of the Master in Chancery, filed in this case, and the Plaintiff appearing by his attorneys Thomas & Foreman, and the defendants appearing by their attorney, W. D. Halfhill, and the defendants ask leave of the Court to withdraw their motion to confirm the Master's report, and said motion is thereupon withdrawn.

Thereupon this cause was argued by counsel, and the Court being fully advised in the premises, it is therefore ordered, adjudged and decreed by the Court, that the Report of the Master in Chancery filed herein in this case, which report was filed in the office of the Clerk of this Court on the 19th day of October, 1907, in so far as they relate to the finding of facts therein, be and the same is hereby sustained, but in so far as a part of the conclusions of law of the Master in Chancery are concerned, the Court does overrule and set the same aside, the Court finds that the defendants, William Sizemore and Jeannetta Newberry, are the nearest relation- of Ellis Grayson, deceased, on the maternal side, and are the sole heirs at law, and entitled by inheritance to the whole of the land described in Plaintiff's Petition, to-wit: The Northwest quarter of the South east quarter of Section Thirteen, Township Seventeen North, Range Seventeen East, and the Southeast quarter of the Northwest quarter, and Lots one and two of section Nineteen, Township Seventeen North, Range Eighteen East, containing in all One Hundred and
76 Sixty three and 60/100 acres (163.60) more or less. The Court further finds that the plaintiff Foyl M. Brady has no right, or valid claim or title to said land, or any part thereof, nor any interest whatever in said land, or any part thereof, but that the defendants, William Sizemore, and Jennett Newberry are the sole owners of said above described land and are entitled to the immediate possession of the same.

It is therefore ordered, adjudged and decreed by the Court, that the title to the above described land be quieted and found to be in the defendants, William Sizemore and Jennetta Newberry and that the plaintiff, Foyl M. Brady be forever and perpetually barred and enjoined from setting up or ascerting any title or interest in and to said premises, adverse to the interest and title of the defendants, William Sizemore and Jennetta Newberry. And that the costs of this suit be taxed against the plaintiff Foyl M. Brady, and that the defendants may recover the-r costs herein expended of and from the plaintiff, and hereof let execution issue for the collection of said costs, unless the plaintiff pay the same within thirty days from this date.

(To the action of the Court in granting said decree, plaintiff excepts and prays on appeal and is given 60 days to prepare and serve case made, 10 days given deft. to suggest amendments; same to be settled on five days' notice to either party.)

Dated this 7" day of May, 1909.

[SEAL.] JOHN H. KING, *Judge*.

Attest:

A. L. SNYDER, *Clerk*.

[Endorsed:] No. 1478. Foyl M. Brady, Plaintiff, vs. William Sizemore and Jeannetta Newberry, defendants. 2-255. Decree of Court. Filed in open Court May 9, 1909. A. L. Snyder, Clerk. W. D. Halfhill, Defendant's Atty.

77 And that afterward to-wit: on July 3, 1909, the Court entered an order nunc pro tunc directing that the answer of the defendants and the motion for a new trial by the plaintiff be filed as of May 7, 1909, which order is in the words and figures following to-wit:

STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court, Sitting at Wagoner.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Order.

This cause coming on to be heard on the motion and stipulation by the parties hereto that an order nunc pro tunc as of May 7th, 1909, be entered herein, giving the plaintiff leave to file a motion for a new trial as of said date, and giving leave to the defendants to file herein the unverified answer as of said date, and the Court being duly advised, it is ordered that the defendants William Sizemore and Jeannetta Newberry have leave to file their unverified answer herein as of May 7, 1909, which unverified answer was tendered by the defendants on said date, and it is further

Ordered, that the plaintiff Foil M. Brady have leave to file herein his motion for a new trial as of May 7, 1909.

JOHN H. KING, *Judge.*

O. K.
THOMAS & FOREMAN,
Attorney for Def'ts.
W. D. HALFHILL,
Attorney for Deft's.

78 That afterward, on the 13th day of July, 1909, the Court made the following order, to-wit:

STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court, Sitting at Wagoner.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

Order

This cause coming on to be heard on the motion and stipulation of the parties hereto that an order nunc pro tunc as of May 7th, 1909, be entered herein, fixing the amount of the bond to be given

by the Plaintiff upon his appeal from the decree in this cause, and the Court being duly advised, it is ordered that an order nunc pro tunc as of May 7th, 1909, be entered, allowing the plaintiff an appeal from the decree in this cause upon his giving bond to be approved by the Court or Clerk in the sum of Two Hundred Dollars ($200.00).

(Signed) JOHN H. KING, *Judge.*

July 13, 1909.

79 STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court, Sitting at Wagoner.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

To the above named defendants and W. D. Halfhill, their attorney of record:

The above and foregoing is hereby tendered to and served upon you and each of you as a true and correct case made in the above entitled cause and it is a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, verdict, exceptions, judgment, and proceedings in the above entitled cause.

THOMAS & FOREMAN,
Attorneys for Plaintiff.

I hereby accept and acknowledge due legal and timely service of the above and foregoing case made. Made on me this 3rd day of July 1909.

W. D. HALFHILL,
Att'y for Defendants.

Filed Aug. 23, 1909.
W. H. L. CAMPBELL, *Clerk.*

80 STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court, Sitting at Wagoner.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

It is hereby stipulated and agreed by and between the parties hereto, that the foregoing case made contains a full, true, correct and

complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and the same is a full, true complete and correct case made; and the said defendants waive the right to suggest amendments to said case made, and hereby consents that the same may be settled immediately and without notice and hereby joins in the request of the plaintiff that the Judge of said Court settle the same and order the same certified to the Clerk of the Supreme Court and filed according to law, and said Defendants hereby waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

THOMAS & FOREMAN,
Attorney for Plaintiff.
W. D. HALFHILL,
Attorney for Defendant.

Filed Aug. 23, 1909.
W. H. L. CAMPBELL, *Clerk.*

81 STATE OF OKLAHOMA,
Muskogee County, ss:

In the District Court. Sitting at Wagoner.

No. 1478, Equity.

FOIL M. BRADY, Plaintiff,
vs.
WILLIAM SIZEMORE and JEANNETTA NEWBERRY, Defendants.

This is to certify that the foregoing above case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the Clerk of the District Court attest the same with the seal of said Court and file the same of record.

Witness my hand at Muskogee, Oklahoma, this 13th day of July 1909.

JOHN H. KING,
District Judge.

Attest:
A. L. SNYDER, [SEAL.]
Clerk of the District Court.

Filed Aug. 23, 1909.
W. H. L. CAMPBELL, *Clerk.*

Endorsed on the Back as follows: Copy Exhibit A. #1030, Filed in District Court Wagoner County, Okla. Jul- 29, 1909. A. L. Snyder, Clerk. Filed Aug. 23, 1909. W. H. L. Campbell, Clerk.

82 Supreme Court, State of Oklahoma.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
JEANNETTA NEWBERRY et al., Defendants in Error.

Motion.

To the Honorable Judges of said Court:

Comes now Foil M. Brady and respectfully prays this Honorable Court for extension of Sixty (60) days' time in which to file his brief herein in support of his petition in error, and as ground for said motion states the following facts.

1. Your petitioner shows that he is represented herein by the firm of Thomas & Foreman, composed of John R. Thomas and Grant Foreman.

2. That said cause was tried throughout by John R. Thomas, an attorney at law, who is thoroughly conversant with the facts and issues in the cause.

3. That said John R. Thomas since the decree was rendered herein has been engaged as a member of the Code Commission authorizd by law in codifying the laws of the State, and by reason of his said employment and engagement of his time has been unable to prepare the brief herein.

4. That on account of the employment of John R. Thomas his partner, Grant Foreman, has been pressed with a large amount of work, which, together with illness and the fact that the said Foreman was not familiar with the issues presented on the trial, has prevented his preparing the necessary brief, and only within the past few days was the said Foreman enabled to confer with John R.
83 Thomas about the theory upon which this cause should be presented to this Honorable Court.

In consideration of the premises, therefore, and solely with the desire of presenting fully and satisfactorily to the Court the law bearing upon the issues in this cause, your petitioner prays that he be allowed an extension of Sixty (60) days' time to file his brief.

FOIL M. BRADY,
Plff. in Error.
By JOHN R. THOMAS &
GRANT FOREMAN.
Attorneys for Plaintiff in Error.

Service of the above motion by copy acknowledged this 11th day of October, 1909, and I consent that said motion be granted.

W. D. HALFHILL.
Attorney for Defendants in Error.

Endorsed: No. 1030. Supreme Court of Oklahoma. Foil M. Brady vs. Jeannetta Newberry et al. Motion for extension of time to file plaintiff's brief. Filed Oct. 13, 1909. W. H. L. Campbell, Clerk.

84 And thereafter to-wit: on the 18" day of October, 1909, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1909, October 18", 1909, Fourteenth Judicial Day.

#1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
JEANNETTA NEWBERRY et al., Defendants in Error.

Ordered by the Court that the motion in the above cause for extension of time to file briefs, be, and the same is hereby sustained.

85 And thereafter to-wit: on the 12" day of September, 1911, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1911, September 12", 1911, First Judicial Day.

#1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WM. SIZEMORE et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

86 And thereafter to-wit: on the 9" day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court, January Term, 1912, January 9th, 1912, First Judicial Day.

#1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and remanded with directions to enter judgment in accordance with this opinion.

Opinion by Turner, C. J.

All the Justices concur.

87 In the Supreme Court of the State of Oklahoma.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

Motion for Rehearing.

Comes now the defendants in error and moves the Court here for a re-hearing of this cause, for the reasons following, to-wit:

First. Because this Honorable Court in its decision filed in this cause, has entirely overlooked the fact that the Creek Laws of "de-cent and distribution," were not repealed by the Supplemental agreement with the Creek Nation of June 30, 1903 for the reason that the act of March 1st, 1901, had already been repealed prior to June 30, 1902, by the terms of the Indian Appropriation Act approved May 27, 1902. (33 Stat. 258).

Second. Because, if Ellis Grayson, the decedent, at any time ever had any inheritable estate, (and it certainly must be admitted that he had after he had been duly enrolled) not to this particular allotment, but to an equal share of all the lands and money belonging to the Creek Nation, then what would have been the result, or where would his interest have gone, had the Act of March 1st, 1901, never having been repealed? Or in other words, if he had an inheritable interest at any time, it must always have been so after his demise; not to this particular allotment, "but to an equal share of all the lands and money belonging to the Creek Nation, or tribe."

The defendants in error therefore pray that a rehearing of this cause may be had.

W. D. HALFHILL.
Att'y for Defendants in Error.

Endorsed: No. 1030. Foil M. Brady, Plff in error vs. William Sizemore, et al. Defendants in error. Motion for rehearing. Filed Jan. 22 1912 W. H. L. Campbell, clerk.

88 And thereafter to-wit: on the 22 day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court Proceedings.

#1030.

FOYL M. BRADY, Plaintiff in Error,
vs.
WM. SIZEMORE et al., Defendants in Error.

And now on this Jan. 22 1912 it is ordered by the court that the mandate of this court in the above cause be stayed, and the opinion of the court herein, heretofore filed, be withdrawn for correction.

89 And thereafter to-wit: on the 23rd day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court, January Term, 1912, January 23rd, 1912, Seventh Judicial Day.

#1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WM. SIZEMORE et al., Defendants in Error.

And now on this day it is ordered by the court that the opinion heretofore filed in the above cause by the court be withdrawn for correction, and as so corrected is hereby refiled, and the mandate of this court herein is hereby stayed.

90 In the Supreme Court of the State of Oklahoma.

(Filed January 23, 1912.)

In Lieu of Former Opinion which has been Withdrawn.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

(*Syllabus by the Court.*)

(1) Where a duly enrolled citizen of the Creek Nation died on March 1st, 1901, before receiving his allotment or a certificate of selection therefor, Held, that he died seized of no estate of inheritance therein.

(2) Where a duly enrolled citizen of the Creek Nation died on March 1st, 1901, before receiving his allotment for which, on August

23rd, 1902, certificate of selection issued to his heirs, Held, that Chapter 49 of Mansfield's Digest of the Laws of Arkansas govern the devolution of the allotment, as provided by Sec. 6 of an act of Congress approved June 30, 1902, ratified July 26, 1902, and known as the Creek Supplemental Agreement, to be applied as if deceased had received title to his allotment and died seized thereof.

Error from the District Court of Wagoner County.

John H. King, Judge.

Reversed.

John R. Thomas and Grant Foreman, Attorneys for Plaintiff in Error.

W. D. Halfhill, Attorney for Defendants in Error.

91 *Opinion of the Court.*

By TURNER, *C. J.*:

On December 8, 1905, plaintiff in error, Foil M. Brady, alleging himself to be the sole heir at law of Ellis Grayson, a deceased citizen of the Creek Nation, sued William Sizemore and Jeannetta Newberry, defendants in error, who claimed to be his sole heirs, in the United States Court for the Indian Territory, Northern District at Wagoner, to determine the question of heirship and which of the two contending parties was entitled to the allotment of said deceased. After reference to the master there was a trial to the court and judgment for defendants and plaintiff brings the case here. The facts are that Ellis Grayson, a duly enrolled citizen of the Creek Nation and, as such, entitled to an allotment, died intestate March 1, 1901, leaving him surviving neither child nor children nor their de-cendants, nor father nor mother, nor brother nor sister; but leaving him surviving plaintiff in error the son of an aunt on the paternal side and defendants in error, the children of an aunt on the maternal side—all three claimants being first cousins of the deceased. That on August 23rd, 1902, the Commission to the Five Civilized Tribes issued to the heirs of said Grayson a "certificate of selection" for the N. W. ¼ of the S. W. ¼ of Sec. 13, Twp. 17 N. R. 17 E. and the S. E. ¼ of the N. W. ¼ and lots 1 and 2 of Sec. 19, Twp. 17, N. R. 18 E. Containing 163.60 acres; that on June 13th, 1905, the Principal Chief of the Creek Nation delivered to plaintiff as the heir at law of said Grayson patents therefor which had been approved by the Secretary of the Interior and were thereafter duly recorded.

92 It is insisted for Brady, herein called plaintiff, that Chapter 49 of Mansfield's Dig. of the Laws of Arkansas is the governing statute and determines the devolution and that he as the sole heir of the allottee is entitled to the whole allotment. On the other hand by defendants in error, herein called defendants, it is contended that the Creek Law of Descent and Distribution determines the devolution and that they, who are brother and sister, are his

"nearest relation" and as such the sole heirs of the allottee and entitled to his allotment in equal moieties. The trial court took this view, but therein was error. Having died on March 1st, 1901, after enrollment (under the "Curtis Act") and before receiving his allotment, it might seem, as contended, that the devolution of this allotment is governed by section 28 of the original agreement ratified May 25th, which reads:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

and that such would be in keeping with Sanders vs. Sanders et al., 28 Okla. 59. Not so. In that case where a duly enrolled citizen of the Creek Nation was in possession of and had filed upon her allotment pursuant to the "Curtis Act" approved June 28, 1898, and died April 28, 1900, without receiving her certificate of allotment, we held that she died seized of no inheritable estate and that her certificate having issued May 24, 1901, or prior to the
93 ratification of the Supplemental Agreement, that said allotment descended according to the laws of descent and distribution of the Creek Nation. And we might so hold here but for the fact that not only at the time said act was ratified, no selection of his allotment having been made, Grayson died seized of no inheritable estate or vested right in said allotment and therefore had no allotment upon which said Sec. 28 could operate; but for the further fact, not appearing in the Sanders case, that such was true until August 23, 1902, which was after ratification of the supplemental agreement, when his allotment was selected and certificate of selection therefor, on said date, issued to his heirs. Then and not until then did any law of descent and distribution take hold of the then created res and determine its devolution. At that time section 6 of the "Supplemental Agreement" approved June 30th, 1902, and ratified July 26, 1902, provided:

"The provisions of the act of Congress approved March 1, 1901, (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statute of Arkansas now in force in Indian Territory. * * *

Which, being the law in force at the date of the allottee's certificate, we hold to be the governing statute here; the same to be

applied as if the deceased had received title to his allotment and died seized thereof. (Barnett et al. vs. Way et al., — Okla. —.)

This is in keeping with what we held in Hooks et al. v. Kennard et al., 28 Okla. 457. There the three allottees whose estates were involved were enrolled under Sec. 28 of the original agreement ratified May 25th, 1901, and lands were allotted to them and in their names prior to said supplemental agreement. One died prior to the ratification of the supplemental agreement—patents
94 thereafter issued. On this state of facts the question was which law governed the devolution of the estate, the law in force at the date of their certificates or the law in force at the date of their patents. The court held the same to be the former which was the Creek law directed to Apply by Sec. 28 of the original agreement. This for the reason, we take it, that upon the issuance of certificates and not before, did there come into being an estate capable of descending and that then said section for the first time had a subject matter upon which to operate. What we would hold if, prior to the ratification of said supplemental agreement and the consequent operation of said Sec. 6, which in terms repealed the provisions of the Original Agreement in so far as the same provided for descent and distribution of the Creek Nation and substituted therefor the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest of the Laws of Arkansas, rights had vested in virtue of that part of the act repealed, we need not state. It is sufficient to say that no such question is here presented and, no rights having thus accrued Congress, prior thereto, had a right to change the legislative intent and make other provision regarding those allotments, which it did by enacting Sec. 6 changing the course of their devolution and provide, in effect, as it did that the laws of Arkansas should thereto apply instead of the laws of the Creek Nation.

Having held that the Laws of Arkansas, supra, govern the devolution, there being no question of Brady's right to take thereunder, the judgment of the trial court is reversed and remanded with directions to enter judgment in accordance with this opinion.

All the Justices concur.

95 And thereafter to-wit: on the 6th day of February, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court, January Term, 1912, February 6th, 1912, Tenth Judicial Day.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,

vs.

WM. SIZEMORE et al, Defendants in Error.

And now on this day it is ordered by the court that the motion of defendant in error herein to stay further proceedings in this case,

in this court, until a certain decision from the U. S. Supreme Court, be, and the same is hereby allowed.

96 In the Supreme Court of the State of Oklahoma.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al, Defendants in Error.

Comes now plaintiff in error, Foil M. Brady, and entering his appearance to the motion for rehearing herein, shows to the court that said motion for rehearing should be overruled for the following reasons, to-wit:

1. The first ground for rehearing herein as set forth in said motion is that the court overlooked the fact that the Creek laws of descent and distribution were not repealed by the Supplemental Agreement with the Creek Nation of June 30, 1902, for the reason that the Act of March 1, 1901, had already been repealed by the terms of the Indian Appropriation Act approved May 27, 1902. (33 Stat. L. 258.)

This statement is erroneous and misleading for the reason that while it is true the section of the Appropriation Act referred to was so framed as to repeal the Creek laws of descent and distribution contained in the Act of March 1, 1901, yet by the express direction of Congress this act did not become effective until after the Supplemental Agreement of June 30, 1902, was enacted.

This direction is contained in a resolution of Congress approved May 27, 1902, the same day the Indian Appropriation Act was enacted, and is found in 32 Stat. L., page 742, and reads as follows:

(No. 24.) Joint Resolution Fixing the Time When Certain Provisions of the Indian Appropriation Act for the Year Ending June Thirtieth, Nineteen Hundred and Three, Shall Take Effect.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the
97 Act entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," shall take effect from and after July first, nineteen hundred and two, except as otherwise specially provided therein.

So it is very evident that this Honorable Court did not over-look the point made by the defendants in error.

2. The grounds set forth in said first paragraph of the motion are immaterial as a consideration of the statute referred to could not possibly change the decision of the court upon the issues in this case.

3. Defendants in error have failed to indicate any theory of the law upon which a consideration of the section of the Act of Congress

referred to in the first paragraph of said motion could be expected to change the decision herein or to have any bearing on the case.

4. The defendants in error in the second paragraph of their motion, invite this Honorable Court to speculate upon what would have happened if the Act of March 1, 1901, had never been repealed and by begging the question saying that "if" Ellis Grayson had an inheritable estate at any time it must have been so after his demise not to this particular allotment "but to an equal share of all the lands and money belonging to the Creek Nation or Tribe."

This last is the very point the court has just passed on in this case and the court has so conclusively demonstrated that Ellis Grayson did not die seized of an inheritable estate that that question is not now open. As to the query what might have happened if certain things had not happened the court distinctly said in the opinion that "what we would hold if, etc., * * * rights had vested in virtue of that part of the Act repealed we need not state. It is sufficient to say that no such question is here represented and, no rights having thus accrued Congress prior thereto had a right
98 to change the legislative intent which it did, etc." As the court will not speculate upon issues which might have been presented but were not, the point made by the defendants in error is without merit.

And in response to the motion served upon him on the 29th day of January, 1912, moving that further proceedings in this cause be stayed until the end of the present term of the Supreme Court of the United States for the reason that substantially the same questions of law as this cause presents are pending in said court, in which in all probability a decision will be handed down by said court during its present term, the plaintiff in error replies as follows:

1. The plaintiff in error is not informed by said motion as to the case in the Supreme Court of the United States in which said question is involved and is therefore without sufficient information to discuss the correctness of the statement in said motion.

2. The plaintiff in error and his attorneys are not advised of any case pending in the Supreme Court of the United States involving the issues that have been determined by the decision herein but they are entirely willing to submit to the judgment of Your Honors whether in view of the premises any reason exists for staying further proceedings herein.

3. This suit has been pending over six years and plaintiff in error indulges the hope that the mandate herein may soon be directed to the trial court so that he may take possession of the land involved before it is too late to prepare the same for cultivation for the crop of this year and he therefore trusts that it will not be found necessary to make an order staying further proceedings herein, as there is no method prescribed by law whereby the moving party, the defendants in error, can be required to compensate the plaintiff in error for the loss of his crop if the order to stay shall occasion such a loss.

Respectfully submitted,

THOMAS & FOREMAN,
Attorneys for Plaintiff in Error.

99 I hereby accept service of a copy of the foregoing reply this 6th day of February, 1912.

W. D. HALFIELD,
Attorney for Defendants in Error.

Endorsed: Supreme Court of Oklahoma. Foil M. Brady, Plaintiff in Error, vs. William Sizemore, et al., Defendants in Error. Reply of Plaintiff in Error to Motion for rehearing and to stay proceedings. Filed Feb. 7, 1912. W. H. L. Campbell, Clerk.

100 And thereafter to-wit: on the 14" day of May, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court, May Term, 1912, May 14," 1912, First Judicial Day.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause should be reversed and remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and remanded with directions to enter judgment in accordance with this opinion.

Opinion by Turner, C. J. All the Justices concur.

101 Filed May 14, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

(*Syllabus by the Court.*)

(1). Where a duly enrolled citizen of the Creek Nation died on March 1st, 1901, before receiving his allotment or a certificate of se-

lection therefor, held, that he died seized of no estate of inheritance therein.

(2). Where a duly enrolled citizen of the Creek Nation died on March 1st, 1901, before receiving his allotment for which, on August 23rd, 1902, certificate of selection issued to his heirs, held, that Chapter 49 of Mansfield's Digest of the Laws of Arkansas governthe devolution of the allotment, as provided by the Indian Appropriation Act of May 27th, 1902, (32 Stat. 258, c. 888) and Sec. 6 of an act of Congress approved June 30, 1902, ratified July 26, 1902, known as the Creek Supplemental Agreement, to be applied as if deceased had received title to his allotment and died seized thereof.

Error from the District Court of Wagoner County.

John H. King, Judge.

Reversed.

John R. Thomas and Grant Foreman, Attorneys for Plaintiff in Error.

W. D. Halfhill, Attorney for Defendants in Error.

102 *Opinion of the Court.*

By TURNER, *C. J.*:

On December 8, 1905, plaintiff in error, Foil M. Brady, alleging himself to be the sole heir at law of Ellis Grayson, a deceased citizen of the Creek Nation, sued William Sizemore and Jeannetta Newberry, defendants in error, who claimed to be his sole heirs, in the United States Court for the Indian Territory, Northern District at Wagoner, to determine the question of heirship and which of the two contending parties was entitled to the allotment of said deceased. After reference to the master there was trial to the court and judgment for defendants and plaintiff brings the case here. The facts are that Ellis Grayson, a duly enrolled citizen of the Creek Nation and, as such, entitled to an allotment, died intestate March 1, 1901, leaving him surviving neither child nor children nor their decendants, nor father nor mother, nor brother nor sister, but leaving him surviving plaintiff in error the son of an aunt on the paternal side and defendants in error, the children of an aunt on the maternal side—all three claimants being first cousins of the deceased. That on August 23rd, 1902, the Commission to the Five Civilized Tribes issued to the heirs of said Grayson a "certificate of selection" for the N. W. ¼ of the S. W. ¼ of Sec. 13, Twp. 17 N., R. 17 E., and the S. E. ¼ of the N. W. ¼ and Lots 1 and 2 of Sec. 19, Twp. 17 N., R. 18 E., containing 163.60 acres; that on June 13th, 1905, the Principal Chief of the Creek Nation delivered to plaintiff as the heir at law of said Grayson patents therefor which had been approved by the Secretary of the Interior and were thereafter duly recorded.

103 It is insisted for Brady, herein called plaintiff, that Chapter 49 of Mansfield's Dig. of the Laws of Arkansas is the gov-

erning statute and determines the devolution and that he as the sole heir of the allottee is entitled to the whole allotment. On the other hand by defendants in error, herein called defendants, it is contended that the Creek Law of Descent and Distribution determines the devolution and that they, who are brother and sister, are his "nearest relation" and as such the sole heirs of the allottee and entitled to his allotment in equal moieties. The trial court took this view, but therein was error. Having died on March 1st, 1901, after enrollment (under the "Curtis Act") and before receiving his allotment, it might seem, as contended, that the devolution of his allotment is governed by section 28 of the original agreement ratified May 25th, 1901, which reads:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

and that such would be in keeping with Sanders vs. Sanders et al., 28 Okla. 59. Not so. In that case where a duly enrolled citizen of the Creek Nation was in possession of and had filed upon her allotment pursuant to the "Curtis Act," approved June 28, 1898, and died April 28, 1900, without receiving her certificate of allotment, we held that she died seized of no inheritable estate and that her cer-
104 tificate having issued May 24, 1901, or prior to the ratification of the Supplemental Agreement, that said allotment descended according to the laws of descent and distribution of the Creek Nation. And we might so hold here but for the fact that not only at the time said act was ratified, no selection of his allotment having been made, Grayson died seized of no inheritable estate or vested right in said allotment and therefore had no allotment upon which said Sec. 28 could operate; but for the further fact, not appearing in the Sanders case, that such was true until August 23, 1902, which was after ratification of the supplemental agreement, when his allotment was selected and certificate of selection therefor, on said date, issued to his heirs. Then and not until then did any law of descent and distribution take hold of the then created res and determine its devolution.

Whether the Indian appropriation act passed by Congress May 23rd, 1902, (32 St. 258, c. 888), which took effect by virtue of a joint resolution July 1st, 1902, repealed the provisions of said original agreement in so far as it provided for descent and distribution according to the Creek law and substituted therefor Chapter 49 of Mansfield's Digest, we need not say, for, if not, Section 6 of the "Sup-

plemental Agreement" approved June 30, 1902, ratified July 26, 1902, did that very thing. Section 6 of said supplemental agreement provides:

"The provisions of the act of Congress approved March 1, 1901, (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: * * *"

Which, said Chapter 49, being the law of descent and dis-
105 tribution in force at the date of the allottee's certificate, we hold to be the governing statute here; the same to be applied as if the deceased had received title to his allotment and died seized there*for*. (Barnett et al. vs. Way et al., — Okla. — .)

This is in keeping with what he held in Hooks et al. v. Kennard et al., 28 Okla. 457. There the three allottees whose estates were involved were enrolled under Sec. 28 of the original agreement ratified May 25th, 1901, and lands were allotted to them and in their names prior to said supplemental agreement. One died prior to the ratification of the supplemental agreement—patents thereafter issued. On this state of facts the question was which law governed the devolution of the estate, the law in force at the date of their certificates or the law in force at the date of their patents. The court held the same to be the former which was the Creek law directed to apply by Sec. 28 of the original agreement. This for the reason, we take it, that upon the issuance of certificates and not before, did there come into being an estate capable of descending and that then said section for the first time had a subject matter upon which to operate. What we would hold if, prior to the ratification of said supplemental agreement and the consequent operation of said Sec. 6, which in terms repealed the provisions of the Original Agreement in so far as the same provided for descent and distribution of the Creek Nation and substituted therefor the laws of descent and distribution contained in Chapter 49 of Mansfield's Digest of the Laws of Arkansas, rights had vested in virtue of that part of the act repealed, we need not state. It is sufficient to say that no such question
106 is here presented and, no rights having thus accrued Congress, prior thereto, had a right to change the legislative intent and make other provision regarding those allotments, which it did by enacting Sec. 6 changing the course of their devolution and provide, in effect, as it did that the laws of Arkansas should thereto apply instead of the laws of the Creek Nation.

Having held that the laws of Arkansas, supra, govern the devolution, there being no question of Brady's right to take thereunder, the judgment of the trial court is reversed and remanded with directions to enter judgment in accordance with this opinion.

All the Justices concur.

107 And thereafter at the May 1912 term of said Court, on the 18th day of May, 1912, the following proceeding was had in said cause, to-wit:

No. 1030.

FOIL M. BRADY, Plaintiff in Error,
vs.
WILLIAM SIZEMORE et al., Defendants in Error.

On this the 18th day of May, 1912, this cause coming on further to be heard on the petition of the defendants in error for a rehearing hereof, the defendants in error are hereby given leave to withdraw the petition for rehearing heretofore filed in said cause, and to refile the same herein as of this date.

It appearing to the court that the defendants in error, in accordance with the leave heretofore given, to withdraw their petition for rehearing, and to refile the same of this date, have filed said petition for rehearing, and the same now coming on to be heard and considered by the court, the court finds that said petition for rehearing should be disallowed and overruled.

It is, therefore, ordered, adjudged and decreed that said petition for rehearing be, and the same hereby is, denied, disallowed and overruled, to which judgment and action of the court the defendants in error, and each of them severally and separately except, and, in open court, pray an appeal to the Supreme Court of the United States from the judgment of the court rendered in this cause, which appeal is allowed.

108 SUPREME COURT,
State of Oklahoma, ss:

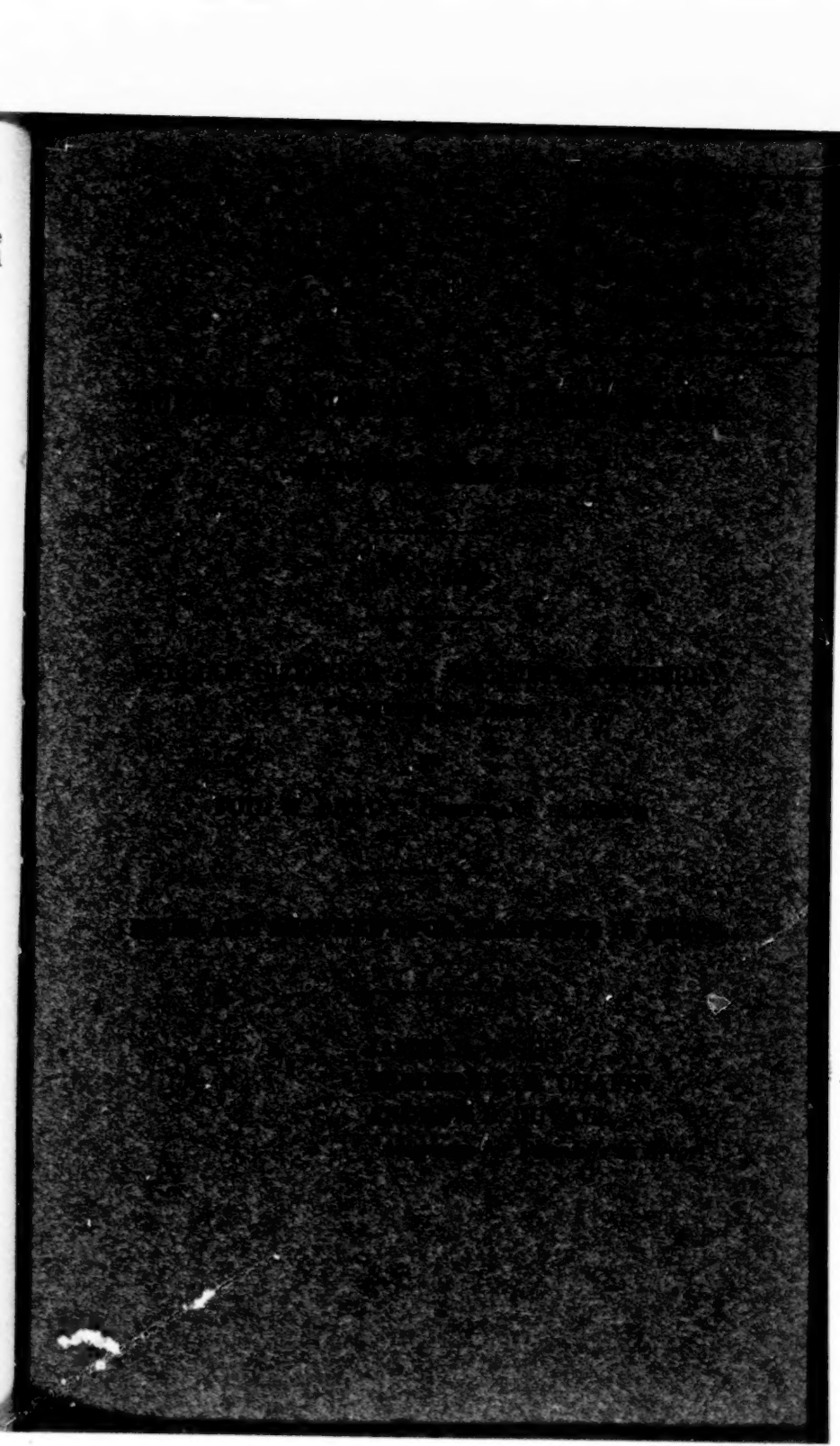
I, W. H. L. Campbell, clerk of said court, do hereby certify that the foregoing pages, numbered from one to 107 both inclusive, are a true, full and complete transcript of the record and proceedings in the case of Foil M. Brady, plaintiff in error, versus William Sizemore and Jeanetta Newberry, defendants in error, and also the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at my office in Oklahoma City, Oklahoma this the 7" day of September, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,366. Oklahoma Supreme Court. Term No. 791. William Sizemore and Jeanetta Newberry, plaintiffs in error, vs. Foil M. Brady. Filed September 24th, 1912. File No. 23,366.



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I.

An enrolled member, a citizen of the Creek Tribe or Nation of Indians, who dies prior to the going into effect of the act of March 1, 1901 (31 Stat. L., 861), known as the Creek Agreement, and who, under the terms of such treaty, would be entitled to receive an allotment, and who dies without having selected or received such allotment, the allotment such citizen would have been entitled to under the treaty had he lived to select and receive the same descends to his heirs under the Original Creek Agreement, and such heirs are to be ascertained as of the date of the death of such enrolled Creek citizen, and the right of the heirs of such enrolled member or citizen of the Creek Nation to such allotment is a vested right, which cannot be impaired or taken away by subsequent legislation 9

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II.

If the act of June 30, 1902 (32 Stat. L., 500), known as the Supplemental Creek Agreement, which was in force at the time of the selection of the land, determines the heirs, such Supplemental Agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the Supplemental Agreement; but such Supplemental Agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect 60

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 59.

WILLIAM SIZEMORE AND JEANETTA NEWBERRY,
PLAINTIFFS IN ERROR,

vs.

FOIL M. BRADY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

Statement of the Case.

This case was commenced in the United States District Court in the Indian Territory and was afterward, on statehood, transferred to the District Court of Muskogee County, where the same was tried, judgment rendered, and appeal taken to the Supreme Court of the State of Oklahoma, and a writ of error allowed from this court to that. The material facts are as follows:

Ellis Grayson was a duly enrolled member and citizen of the Creek Tribe or Nation of Indians, and was, as such, entitled to an allotment. He died in the Creek Nation on the first day of March, 1901, leaving surviving him neither child nor children, nor descendants of child nor children, nor father nor mother, nor brother nor sister or their descend-

ants; but he left surviving him as his nearest kin William Sizemore, Jeanetta Newberry, and Foil M. Brady.

After the death of Ellis Grayson, and in accordance with the treaties and the laws of the United States governing the same, there was issued to the heirs of Ellis Grayson a certificate of selection to the lands embraced in this suit, which are as follows:

> The northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section thirteen (13), township seventeen (17) north, range seventeen (17) east; and the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼), and lots one and two (1 & 2) of section nineteen (19), township seventeen (17) north, range eighteen (18) east;

and allotment deeds or patents conveying such lands to the heirs of Ellis Grayson were executed on the 26th day of March, 1904. These deeds were approved by the Secretary of the Interior on April 25, 1904.

Foil M. Brady is a cousin of Ellis Grayson, his mother being a sister of the father of Ellis Grayson. William Sizemore and Jeanetta Newberry are first cousins of Ellis Grayson on the mother's side and third cousins to Ellis Grayson on the father's side, Foil M. Brady, William Sizemore, and Jeanetta Newberry all being first cousins of Ellis Grayson and related to him within the same degree.

At the time of the death of Ellis Grayson, the Creek law of descent was in force in the Creek Nation, and the land of said Ellis Grayson descended according to the law of descent of the Creek Nation, the law of descent in the Creek Nation being as follows:

> "*Be it further enacted*, That if any person die, without a will, having property and children, the property shall be equally divided among the children by disinterested parties; and, in all cases where there are no children, the nearest relation shall inherit the property" (Laws of Muskogee Nation of 1880, page 132, section 6).

Ellis Grayson died intestate.

The above is a résumé of the findings of fact in the case and sets out in substance each of the findings of fact. (See "Findings of Fact," Printed Record, pages 22 and 23.)

After the filing of the case in the District Court of the United States for Indian Territory the case was referred to the master in chancery, Thomas A. Sanson, to take evidence and report his findings of fact, conclusions of law, and recommendations to the court.

After hearing the evidence, the master found the facts as above stated, and concluded from said facts that Foil M. Brady, William Sizemore, and Jeanetta Newberry were each entitled, as the nearest of kin of Ellis Grayson, to an undivided one-third (1/3) interest in and to the land of said Ellis Grayson by inheritance ("Conclusions of Law," page 23, Printed Record). The master therefore recommended the entering of a decree finding Foil M. Brady, William Sizemore, and Jeanetta Newberry to be the sole heirs-at-law of Ellis Grayson, and as such each was entitled to an undivided one-third (1/3) interest in and to all the lands involved in the suit, and that the court appoint commissioners to partition and set off to each of said persons his or her respective share of said land ("Recommendations of Master," page 24 of Printed Record).

Exceptions were filed to the master's report by Foil M. Brady, defendant in error, plaintiff below (Printed Record, pages 34-36).

William Sizemore and Jeanetta Newberry filed exceptions to the report of said master (Printed Record, page 37).

The report of the master, together with the exceptions thereto, came on to be heard in the District Court of Muskogee County, Oklahoma, and the court, after considering the report of the master in chancery, the exceptions thereto, and being fully advised, approved the report of the master in so far as the same relates to the findings of fact, but set aside the master's conclusions of law, and held that William Sizemore and Jeanetta Newberry were the nearest relations of

Ellis Grayson, deceased, on the maternal side, and therefore were his sole heirs-at-law and entitled by inheritance to the whole of the land heretofore described, and found that Foil M. Brady had no right or title to the land. Decree was entered in favor of William Sizemore and Jeanetta Newberry, decreeing them to be the owners of the land and quieting their title to the same against any claim of Foil M. Brady and taxing the cost against her.

Foil M. Brady filed a motion for a new trial, which was overruled, and appeal taken to the Supreme Court of the State of Oklahoma (Record, pages 41-42). The case came on to be heard in the Supreme Court of Oklahoma on the appeal of Foil M. Brady from the decree of the District Court of Muskogee County, Oklahoma, and the Supreme Court of Oklahoma reversed and remanded said cause, with directions to enter judgment in favor of Foil M. Brady and against William Sizemore and Jeanetta Newberry, finding that the land passed under the Arkansas law in force at the date of its selection, and not under the Creek law in force at the death of Ellis Grayson, and finding that, under the Arkansas law, Foil M. Brady, being a first cousin of Ellis Grayson on the paternal side, took, to the exclusion of William Sizemore and Jeanetta Newberry (who were cousins of Ellis Grayson on the maternal side). (See "Opinion of Court," pages 50-53, Printed Record; pages 57-59, Printed Record.) Application for rehearing of the case was duly filed in the Supreme Court on the part of William Sizemore and Jeanetta Newberry. Petition for rehearing was overruled, stay of judgment entered pending appeal to the United States Supreme Court, and William Sizemore and Jeanetta Newberry sued out and obtained a writ of error to this court for the purpose of reviewing the judgment of the Supreme Court of the State of Oklahoma.

On the foregoing record William Sizemore and Jeanetta Newberry, plaintiffs in error, assign the following errors:

Assignments of Error.

I. The court committed error of law in holding the lands described in the petition herein did not devolve and pass under the Creek law, in accordance with provisions of section 28 of the act of Congress of March 1, 1901, known as the Original Creek Agreement, and that William Sizemore and Jeanetta Newberry were not, as heirs of Ellis Grayson, entitled to inherit, share in, or own lands of the Creek Tribe or Nation of Indians, which the said Ellis Grayson would have been entitled to receive had he lived.

II. In rendering and entering said judgment and decree the Supreme Court of Oklahoma committed error of law in holding that it was necessary for Ellis Grayson to have made a selection of the lands of the Creek or Muskogee Tribe or Nation of Indians before his death, in order for such allotment of lands, when made, to pass to and vest in the heirs of Ellis Grayson under the Creek law, and in holding said allotment not having been selected by Ellis Grayson in his lifetime, it on his death, on March 1, 1901, leaving him surviving neither child nor children, nor their descendants, neither father nor mother, nor brother nor sister, nor their descendants, but leaving him surviving Foil M. Brady, a son of an aunt on the paternal side, and William Sizemore and Jeanetta Newberry, children of an aunt on the maternal side, said William Sizemore and Jeanetta Newberry had no right to take and never became vested with any right, title, or interest in said land when a deed thereto was issued under the terms of the Creek law.

III. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that the right and title to the lands allotted to the heirs of Ellis Grayson devolved and passed under chapter

49 of Mansfield's Digest of the Laws of Arkansas, under and by virtue of the act of Congress of May 27, 1902 (32 Statutes at Large, 258), and the act of June 30, 1902 (chapter 1323, 32 Statutes at Large, 500), and became vested in Foil M. Brady and not in William Sizemore and Jeanetta Newberry.

IV. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that the allotment of Ellis Grayson, a duly enrolled citizen of the Creek Nation, who died on March 1, 1901, before receiving his allotment, for which on August 23, 1902, a certificate of selection was issued to the heirs of Ellis Grayson, passed to the heirs of Ellis Grayson under chapter 49 of Mansfield's Digest of the Laws of Arkansas, and that said chapter 49 of Mansfield's Digest of the Laws of Arkansas governed the devolution of allotments under the provisions of the act of May 27, 1902 (32 Statutes at Large, 258, chapter 888), and section 6 of the act of Congress of June 30, 1902 (chapter 1323, 32 Statutes at Large, 500), known as the "Creek Supplemental Agreement," and the devolution of said allotment was not governed by the provisions of section 28 of the act of March 1, 1901 (chapter 676, 31 Statutes at Large, 870), known as the "Original Creek Agreement," and in adjudging and decreeing that these defendants, William Sizemore and Jeanetta Newberry, had no interest, title, or estate in said lands.

V. The Supreme Court of the State of Oklahoma committed error of law in rendering and entering said judgment and decree in setting aside the judgment of the trial court, holding that said allotment passed under the Creek law and vested in William Sizemore and Jeanetta Newberry, and in ordering said trial court to enter a judgment holding Foil M. Brady to be the owner of and entitled to the right, interest, and estate in said lands to the exclusion of William Sizemore and Jeanetta Newberry.

VI. The Supreme Court of the State of Oklahoma committed error of law in rendering and entering said judgment and decree, by holding that when Ellis Grayson, a duly enrolled member of the Creek or Muskogee Tribe or Nation of Indians, who died March 1, 1901, without having selected an allotment of lands of the Creek Nation, no interest in said lands, on his death, passed to and vested in his heirs under the Original Creek Agreement, and that no interest in said lands passed to or vested in any one until on and after the selection thereof, and said lands being selected on August 23, 1902, the title thereto devolved on and vested in the heirs of Ellis Grayson under the provisions of chapter 49 of Mansfield's Digest of the Laws of Arkansas, and did not devolve on or vest in the heirs of Ellis Grayson under the act of Congress known as the Original Creek Agreement.

VII. Ellis Grayson, a duly enrolled citizen of the Creek or Muskogee Tribe or Nation of Indians, having died prior to the going into effect of the Original Creek Agreement, and before having received his allotment of lands of the Creek Nation, the court committed error of law in the rendition and entry of said judgment and decree in not holding the lands to which the said Ellis Grayson would have been entitled, if living, descended to his heirs according to the law of descent and distribution of the Creek Nation, and should be allotted to them accordingly.

VIII. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in holding that section 28 of the act of March 1, 1901, was repealed by section 6 of the act of June 30, 1902, in so far as said act affects the descent or devolution of the lands described in the petition.

IX. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in not holding that section 28 of the act of June 30, 1902, and the act of May 27, 1902, in so far as the same undertook to repeal section 28 of the act of March 1, 1901, were prospective only in operation, and did not apply to or govern the devolution of lands, where the person entitled to select such lands died prior to the passage of said acts, and that as to persons entitled to select allotments under the act of March 1, 1901, and who died without so doing, the right to select such lands and to receive deeds therefor vested in the heirs of such person under the Creek law in accordance with the provision of the Original Creek Agreement.

X. The Supreme Court of Oklahoma committed error of law in rendering and entering said judgment and decree in overruling and denying the petition of these defendants in error for a rehearing thereof.

ARGUMENT

While the assignments of error in this cause number ten, yet they in effect present in varying forms merely one or two legal propositions which are, in our judgment, decisive of the question raised on this appeal. Argument on the different assignments of error can be presented to the court more succinctly and to better advantage by a discussion of the decisive questions of law reduced to propositions than if each assignment of error is separately argued and considered. As we view this record and the law controlling this case, the propositions of law may be reduced to two in number and may be formulated as follows:

First. An enrolled member, a citizen of the Creek Tribe or Nation of Indians, who dies prior to the going into effect of the act of March 1, 1901 (31 *Stat.* L., 861), *known as the Creek agreement and who under the terms of such treaty would be entitled to receive an allotment, and who dies without having selected or received such allotment, the allotment such citizen would have been entitled to under the treaty had he lived to select and receive the same descends to his heirs under the Original Creek Agreement, and such heirs are to be ascertained as of the date of the death of such enrolled Creek citizen, and the right of the heirs of such enrolled member or citizen of the Creek Nation to such allotment is a vested right, which cannot be impaired or taken away by subsequent legislation.*

Second. If the act of June 30, 1902 (32 *Stat.* L., 500), *known as the Supplemental Creek Agreement, which was in force at the time of the selection of the land, determines the heirs, such supplemental agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the Supplemental Agreement; but such Supplemental Agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect.*

And of these in their order:

I.

An enrolled member, a citizen of the Creek Tribe or Nation of Indians, who dies prior to the going into effect of the act of March 1, 1901 (31 *Stat. L.*, 861), *known as the Creek Agreement, and who, under the terms of such treaty, would be entitled to receive an allotment, and who dies without having selected or received such allotment, the allotment such citizen would have been entitled to under the treaty had he lived to select and receive the same descends to his heirs under the Original Creek Agreement; and such heirs are to be ascertained as of the date of the death of such enrolled Creek citizen; and the right of the heirs of such enrolled member or citizen of the Creek Nation to such allotment is a vested right, which cannot be impaired or taken away by subsequent legislation.*

In order to determine whether the proposition of law contained in the above sub-head is correct, it will be necessary to examine some of the provisions of the Indian treaties and other acts of Congress governing the allotment, descent and inheritance of lands in the Five Civilized Tribes. The first law it will be necessary to examine is the act of March 1, 1901, commonly known as the Original Creek Agreement. Paragraph 3 of said agreement provides as follows:

> "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission, so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen 160 acres of land, boundaries to conform to the Government survey, which may be selected by him so as to include the improvements which belong to him * * *."

Paragraph 28 of said treaty, among other things, provides as follows:

> "All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the act of Congress approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.
>
> "All children born to citizens so entitled to enrollment, up to and including the first day of July, 1900, and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Paragraph six (6) of the act of Congress of June 30, 1902 (32 Stat. L. 500), known as the Supplemental Creek Agreement, provides as follows:

> "The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statute of Arkansas now in force in Indian Territory, provided that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation, and provided further that if there be no person of Creek citizenship to take the descent and dis-

tribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

Paragraph seven (7) of said Supplemental Agreement provides as follows:

"All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs, as herein provided, and be allotted and distributed to them accordingly."

Section five (5) of the Act of April 26, 1906, generally known as the "Second Curtis Bill," provides as follows:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs, or his lawful assigns, as if the patent or deed had issued to the allotte during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect * * *."

Section 32 of the act approved June 25, 1910, Public No. 313, provides as follows:

"Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or act of Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the land designated

> therein shall inure to and become vested in the heirs, devisees or assigns of such deceased grantee, as if the deed had issued to the deceased grantee during life."

We have set out at large the provisions of all the laws of the United States which, in our judgment, affect or throw light upon the question under examination and discussion. Some of these provisions have been cited because Indian statutes are sometimes construed together as forming a part of one connected whole in the administration of Indian affairs, and thus subsequent acts or provisions of subsequent acts sometimes throw light upon and aid us in elucidating other acts or sections of acts relating to the control, management, and administration of Indian affairs, and subsequent acts sometimes amount to a legislative construction of what was the purpose and intent of Congress in passing laws under examination. One of the established facts in this case is that Ellis Grayson died the first day of March, 1901, leaving surviving him as his next of kin William Seizemore and Jeanetta Newberry and Foil M. Brady, each of said persons being of the same degree of kin. Thus it will be seen that Ellis Grayson died before the Original Creek Agreement went into effect, the operation of that agreement being postponed until the act of Congress putting it into effect should be ratified by the Creek National Council, and the act was ratified by the Creek National Council May 25, 1901. Thus at the time the Original Creek Agreement became of binding force and effect Ellis Grayson was dead, and William Sizemore and Jeanetta Newberry and Foil M. Brady were his heirs and next of kin, and as such became vested, by the provisions of the Original Agreement, with the right to select and have allotted to them, or to have selected for and allotted to them, one hundred sixty acres of land of the Creek Nation in place of Ellis Grayson. That is to say, such treaty gave to the heirs of Ellis Grayson the same right and privilege to select one hundred sixty acres of land as an allotment, or to have the same selected for them as an allotment, as Ellis Grayson

would have had had he been living at the time the Creek Agreement went into force and effect.

It will be noticed that section 28 of the Original Agreement provides for two contingencies on the happening of either, the property to which a citizen of the Creek Tribe would be entitled to receive descends to his heirs. The first is: If such citizen has died since the first day of April, 1899, and before the approval of the Original Agreement. The second: If such a citizen dies after approval of agreement, death occurring under either contingency before receiving an allotment of land or a distributive share of the funds of the tribe. Under either contingency there are two things to descend: The allotment of land, which the deceased Indian would have received had he been living, and that portion of the funds and moneys belonging to the tribe which the deceased citizen would have been entitled to receive as his distributive share thereof had he lived to receive the same.

It is evident there is no distinction drawn, or attempted to be drawn, in said Original Agreement between the two characters of estate or as to the time when either of such estates will vest. It, therefore, follows that each vests at one and the same time, hence the right of the heirs of a deceased citizen to receive the land and a distributive share of the moneys of the tribe which the deceased citizen would have received, if living, accrues at the same instant and under the same law. In this case it is important to determine when this right vests in, accrues to, or devolves on the heirs of any deceased Indian.

The Supreme Court of Oklahoma in its opinion holds, in substance and in effect, that the heir of a deceased allottee takes no interest in the land which would have belonged to such deceased allottee until such land is selected; and until such selection has been made, there is no descendable interest in the land. This, it seems to us, would be to emasculate the statute and destroy not only the effect of the statute and

the purpose and design Congress had in view in its enactment, but it is equivalent to a complete change in the wording of the act itself. The exact words of the statute are:

> "If any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs."

It would seem to be evident, from this express language of the act, that the deceased Indian citizen was vested with some estate in the land which could descend, which would be capable of transmission by act of law, else there would be no necessity for the use of the word "descend." If we circumscribe the meaning of the language used by the Supreme Court of Oklahoma to a particular one hundred and sixty acres of land to be selected, and say, as to such particular one hundred and sixty acres of land, an enrolled citizen of the nation and, in case of his death, his heirs, would have no right in and to such land, and that such selection was the inception of interest in and to a particular tract of land, then we agree with the position assumed by the Supreme Court of Oklahoma. But it is impossible to put such a construction on the opinion of the court. The selection, of course, segregates a particular one hundred and sixty acres of land from the national domain, and is the inception of the right of a citizen, or his heirs, in and to the particularly described tract of land selected, but this is not the inception of the right of a citizen to make a selection of land, and, in case of his death, for his heirs to make such a selection, it is the right to one hundred and sixty acres of land that the treaty gives to each citizen; it is the right to one hundred and sixty acres of land, which, in case of death before selection, descends to the heirs of such citizen, according to the laws of the Creek Nation.

That the construction we advance is correct, seems to us to be determined by the very words used in the treaty itself,

Section 28 of the treaty does not contemplate or provide for what shall happen after the selection of an allotment has been made. By its express language, it is limited to that state of facts, to that condition of affairs which existed prior to the selection of an allotment. The express words of section 28 are: "Before receiving his allotment of lands and distributive share of all the funds of the tribe." Thus, it is seen that the only thing, the only condition that Congress was attempting to provide for by this clause, was death occurring before an allotment had been selected and received. Then, to say that a selection has to be made in order to confer a right, a selection has to be made in order to have an inception to title, is directly in the teeth of section 28, for the reason that, given this construction, there would be nothing to descend to the heir under the wording of the treaty.

It is true that the word "descend," as used in section 28 of the Original Agreement and other sections of the law above quoted, may not be used in its technical sense, but if not used in its technical sense, then, it seems to us, to amount to a grant on the part of the Government and the Creek Nation to the heirs of the deceased Indian to one hundred and sixty acres of land, such land to be segregated and identified by the beneficiary of such grant, selecting from the Tribal lands the particular one hundred and sixty acres of land he desires to take under the grant.

Let us see if this is not the purpose and effect of the Creek Agreement. Congress was desirous of closing up the affairs of the Creek Nation, endowing the citizens thereof with the rights, privileges, burdens, and immunities of citizenship. In order to accomplish this purpose, Congress found it necessary to provide for a division of the Tribal lands of such Nation among the different citizens thereof. In order to do this, it was necessary first to do two things, 1st: to ascertain the objects or beneficiaries of the Government's bounty; 2d: the date at which these objects should be ascertained. There were many ways in which these

objects of bounty could be ascertained. A census of the Tribe might have been taken, the names might have been taken from the rolls of the tribe and set out at large in the act, and many other ways might have been selected to determine such objects, but Congress took as a method of ascertaining such objects, all citizens who were living on the first day of April, 1899, entitled to be enrolled under the act of June 28, 1898, and provided that the names of such persons should be placed on rolls and each should be entitled to an allotment. This is, in effect, equivalent to a grant of such right to each person whose name appears on the roll, to be made, and, in our judgment, is of the same legal effect as if Congress had first ascertained the objects of its bounty and then prescribed that each of said objects of bounty, by name, should receive an allotment, and in case of his death, that it should descend to his heirs. The date, April 1, 1899, was doubtless fixed as a starting point from which to reckon, owing to the fact that was the date of the opening of what is known as the "Land Office" in the Indian Territory; and, consequently, was a date of historic interest from which the Indian could readily reckon as to whether a certain citizen was or was not living on such date.

Congress must be considered as knowing that any date that it might select as the period from which to ascertain persons entitled to receive allotment, that many of such persons would die before the law went into effect; and, consequently, the title to the lands to which such persons would be entitled would remain in the Creek Nation, and require other acts of Congress in order to get the title out of the Creek Nation and to finally wind up the affairs of such Nation. Hence, it was necessary for Congress to create some plan by which this difficulty would be avoided. It sought to avoid this difficulty by providing that in case of death after April 1, 1899, and before the approval of the agreement, and in case of death after the approval of the act, and before receiving the allotment, such allotment should de-

scend to the heirs. The purpose of Congress being to get title out of the Creek Nation and vest it in the individual citizen thereof, or in the heirs of such citizen, it became unnecessary for Congress to provide what should become of the land after selection. This was left, and wisely left, to be determined by the general law of the land. Congress desired only to get title out of the Creek Nation and to provide for vesting it in the citizens thereof, or in the heirs of such citizens. In order to accomplish this, it said that certain citizens should receive an allotment, and if they died before receiving such allotment, it should descend to their heirs. This language is clear, plain, and, it seems to us, unmistakable in its meaning. The right to select, or to have selected, one hundred and sixty acres of land was given to each citizen of a tribe who met the requirements of the treaty. In case such citizen died, without having exercised his right, this right devolved on, or descended to his heirs.

It is apparent, and it seems to us beyond controversy, that where a citizen who met the requirements of the treaty died prior to the treaty, this right descended to his heirs with like force and effect as if the heir had been given by Congress in the first place the right to make the selection, or the right to an allotment. In other words, the purpose and design of Congress was that if any citizen who met the requirements of the treaty died either before the treaty went into effect or after the treaty went into effect without making such selection, the right to such allotment and to make its selection passed directly to his heirs. In other words, that the heirs became a unit of distribution instead of the deceased citizen; became a unit of distribution with like force and effect as if his or their names had been placed on the rolls in place of the deceased citizen from whom the allotment is claimed as an inheritance. The heirs become the units of distribution instead of the original citizen. That is, they are to be treated as if their names instead of the original allottee's name was placed on the rolls. The heirs, by substitution, becoming entitled to the same quality, char-

acter and kind of estate that the deceased citizen would have been entitled to receive had he lived to receive the same.

If the Supreme Court of Oklahoma be correct in holding that the segregation of the land by selection is the inception of right, and prior to that time there is no equitable or legal estate vested in the deceased citizen, or in his heirs, which was capable of inheritance, transmission or conveyance, how can a selection ever be made? It is the existence of a right to an allotment which confers upon the citizen, the heirs of the citizen, or the commission the power and authority to make a selection; a selection must be made in the name of, and for the benefit of, a person or persons entitled thereto. The reasoning of the Supreme Court of Oklahoma would make the selection of the allotment designate the heir, and confer a right to land which did not exist before, whereas in truth and in fact, the right to the land exists before selection and the segregation of the land by selection is merely a designation of the particular land to which the right attaches. To say the selection is the inception of right in any other sense than as a right to a particularly described piece of land is to place the cart before the horse; and to say that without any right a selection of land can be made, and then on selection a right to, and full legal title in, the land selected vests in the person selecting without any prior right on his part to make such selection, is, it seems to us, an anomaly and is not, and cannot be, the law.

Ellis Grayson was living on the 1st of April, 1899, and died after that date—on March 1, 1901. He was, therefore, exactly within the description of a citizen who was living on that day, and who died since that time, contained in the Original Agreement. So it is provided that the lands to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly, unless this rule be changed by the Supplemental Agreement. The question, therefore, for solution is: Did

and could the Supplemental Agreement change the order of descent of lands of Ellis Grayson to which he would have been entitled had he been living when the act went into effect? In other words, Did the persons who were the heirs of Ellis Grayson at the time of his death, take a vested interest in his land thereafter allotted, which Congress and the Creek Council either did not, or could not, take away by subsequent legislation?

Let us consider the character of title, if any, Ellis Grayson had when he died. The lands of the Five Civilized Tribes belonged to the tribal community, and no individual as such had any title thereto. Thus the title to lands in the Creek Nation was vested in the nation as such and continued so until the process of apportioning them in severalty began under the Curtis act of 1898, and subsequent legislation, particularly the act of 1901, above referred to. The act creating the Dawes Commission, passed March 3, 1893, did not itself provide for any allotment in severalty, but simply for enrollment of citizens and empowering the Commission to enter into agreement with the Five Civilized Tribes as to allotment in severalty. Not until March 1, 1901, was any agreement effected, and, consequently, not until that date was there any semblance of a title in severalty in any Indian. True the act of 1901, called the "Original Agreement," provided for the enrollment of citizens living April 1, 1899, and this would include Ellis Grayson. But this provision of section 28 also provides that if such persons so living on April 1, 1899, shall have died before allotment the allotment shall be to the heirs of such person. The result is the only grant which was made for the Ellis Grayson allotment was made, not to him, he being dead, but to his heirs. The heirs, therefore, took by purchase and not by descent. Ellis Grayson himself was never entitled to allotment, but his heirs were. The title to the lands being in the Creek Nation, subject only to reversion to the United States in case of abandonment or non-occupation, and subject to restrictions on all alienation

except to the United States, it took the agreement made under the act of Congress, and such act, to confer title in severalty to the Indian lands. Now, as no agreement was effected until after Ellis Grayson's death, he never acquired any title thereto of any kind. The grant, then, of the right to have an allotment was made to the heirs of Ellis Grayson and not to him. In other words, as stated, the heirs took by purchase, and not by descent.

Who, then, were the persons who took the allotment by purchase under the designation of the heirs of Ellis Grayson? The Original Agreement answers this, for it states that they were the persons who were the heirs under "the laws of the Creek Nation."

We are not troubled with the question of whether the agreement meant the persons who were his heirs at the time of his death or at the time the act and agreement was made, because the heirs were the same persons under the Creek law at both dates, to wit, March 1, 1901, and May 25, 1901, and because the act is in the nature of a grant and describes the grantees as the heirs according to the Creek law. Thus, excluding any inquiry as to who may have been the heirs at the time of his death by any other law or act of Congress, we have then a grant from the United States and from the Creek Nation to the heirs of Ellis Grayson, made in 1901. True no land was granted, but simply the right to an allotment. But the act specifically provides for descent in case of death before receiving allotments according to the law of the Creek Nation.

It is true that the use of the word "descend" is perhaps inaccurate and non-technical, as applied to existing conditions, because it implies a succession in interest to property already owned. But the intention is so manifest to make a grant that this inaccurate use will not control the sense Congress therefore not only provided for the dsecent and distribution of lands which had been allotted before the death of the person, but also provided for the distribution of

the land that such person would be entitled to if he had lived where he died prior to allotment. Therefore the declaration of the act and of the agreement is: That the lands which Ellis Grayson would have been entitled to had he lived to secure allotment should be distributed to his heirs under the Creek law. It is difficult to see why this would not create a vested interest in such heirs, if not in the land itself, then in the right to an allotment of the land; and if the inchoate right to Ellis Grayson's allotment was not land, it was a right of some kind or character by which land and personal property could thereafter be secured, and thereby became property, and could not be taken away by any subsequent legislative act. A vested right in personal property would be as much protected as a vested right in land. It is uniformly held that the legislature cannot take away by subsequent enactment a right of inheritance existing at the time of the death of a person under the laws of descent and distribution then in force.

Ellis Grayson, meeting all the requirements of the Original Agreement, entitling him to an allotment and to make a selection for an allotment, and dying without exercising such right, this right, by the express words of the statute, descended to his heirs, and those heirs in existence at the time of his death and at the time of going into operation of the law, are the persons who were given the right, under the treaty, to make such selection. The heirs of Ellis Grayson must have existed at the instant of his death. The living have no heirs. Heirs to exist must be in being at the instant of death. Persons not in being at the time of death can never, except by a fiction of law, become the heirs of a deceased person. The grant, contained in section 28 of the Original Agreement, for the descent therein provided, is to the heirs, not to the heirs living at the date of selection. If Congress had intended to limit the descent to the heirs living at the date of the selection, what would have been more appropriate than to have said:

> "If any such citizen has died since that time, or may hereafter die, before receiving his allotment of the lands and the distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs living at the time of the selection, according to the laws of descent and distribution of the Creek Nation."

It is, we think, clear that Congress intended the right to make a selection to descend to the heirs living at the date of death of the enrolled citizen who would have been entitled to select the allotment, save for his death, and that such persons should exercise this right and become vested with the same kind and character of estate that the enrolled citizen would have been entitled to had he lived. In other words, that, by substitution, such heirs become the original units of distribution in place and instead of the enrolled citizen living April 1, 1899, and who died without receiving an allotment.

It is submitted that this construction is in harmony with the words of the act. Nothing in the act provides that all the one hundred and sixty acres should be selected at the same time; and, as a matter of general knowledge, selections were not often so made. Under the rule adopted by the Supreme Court of Oklahoma, if sixty acres of this land had been selected the day before the Supplemental Agreement went into force and effect, it would have gone to the heirs of Ellis Grayson, ascertained under the Creek law as of the date of death; if the remaining one hundred acres of land had been selected one day after the Supplemental Agreement went into force and effect, the selection would be made for the benefit of the heirs of Ellis Grayson, ascertained as of date of death, under the Arkansas law. The pertinent inquiry arises: If selection is the inception and foundation of the right from whence comes the right or power to make a selection? Again, the funds of the Creek Nation, to which the heirs of Ellis Grayson would be entitled to under the original treaty, according to the doctrine ad-

vanced by the Supreme Court of Oklahoma, might pass under one law, and, consequently, to an entirely different set of heirs than the land, which could descend under another law to another set of heirs. A construction which could render such a condition possible, it seems to us, is unjustified and will not, and should not, be sustained.

Let us see to what condition the doctrine of the Supreme Court of Oklahoma has brought the law in this regard: A Creek citizen, who meets all the requirements of the act, dies without making a selection. The court holds such citizen had no right, title, interest, or estate in any lands; that the treaty is not the inception of his right; that his meeting of the conditions set forth in the treaty is not the inception of his right, because it is said the inception of such right is the selection. The allottee without having an estate or interest which is capable of descending, of course, his heirs take nothing, and there is no method by which such heirs can take. To get around this difficulty, to overcome this dilemma, the Supreme Court has indulged fiction upon fiction. It holds in Barnett *vs.* Way, 119 Pac., 418; in Shallenberger *vs.* Fewell, 124 Pac., 617; Reynolds *vs.* Fewell, 124 Pac., 623, that while such deceased Indian had no right, title, interest, or estate in and to the allotment, he will be treated as having lived to receive the allotment, and then having died possessed of the allotment, thus transmitting the title he did not have to his heirs; and then carries by fiction piled upon fiction this supposed title through any number of supposed heirs up to the time the selection is made. This, it seems to us, is unsound.

It will be unnecessary to resurrect the dead, confer upon them title to land, again consign them to the tomb, vest title to the land in the dead heirs, resurrect such dead heirs for the purpose of vesting them with supposititious title, letting them die possessed with such imaginary title, consigning them again to the tomb, and so on down the line till we come to a person who answers the description of being an heir who makes a selection; how much easier, how much

plainer, how much simpler, and it is submitted, how much more in accordance with the rules of common sense it is to say the deceased citizen who meets the requirements of the treaty and dies without making his selection, has the right to an allotment and transmits such right to his heirs, and if such heir dies without making such selection, he transmits it to his heirs, and when the selection is made, this right attaches to the particular one hundred and sixty acres of land selected. It was evidently the purpose of Congress to treat the right to the land as the land itself, and to put the Indian citizen, for the purpose of transmission of the right to an allotment, in the same position as if he had received the allotment and died possessed of it, and so transmitted it to his heirs.

It seems to us that it is apparent from the original treaty that Congress intended, for the purpose of getting the title to land out of the Creek Nation, to treat an Indian citizen who died without having made a selection of land the same as if the selection had been made and title vested in such citizen prior to his death; and that his heirs should take the land as if such selection had been made and such deceased citizen had died possessed of title to the same.

This appears to be the legislative construction placed on such act by Congress, for in the act of April 26, 1906, and in the act of June 25, 1910, *supra*, it is expressly provided that deeds to be issued to lands where the person entitled to receive the same died before the issuance of the deeds the title should inure to the benefit of the heirs of such deceased citizen, "as if the deed had issued to the deceased grantee during life."

In Shulthis *vs.* McDougal, 170 Federal, 529, the Circuit Court of Appeals, Eighth Circuit, in discussing the Supplemental Agreement, says:

> "The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of

the child before he had actually become seized of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it, as used in this connection, it must be held that the intent of the parties to the Agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall 'descend' but also declares that it shall be 'allotted and distributed' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the Agreement.

"This construction receives support by the general scheme which the Federal Government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership, proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll

was entitled to an equal proportion of the tribal lands and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the sale of tribal property which would go to them if living. Such a provision was necessary. Otherwise, there would have been a portion of the tribal property undistributed. It was never the intent, however, either of the tribe or of the Federal Government to grant to parties having a kinsman who had died before the actual making of the allotment additional lands as a bounty. These kinsmen got all their right to additional land under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

"Congress itself has construed this statute. Section 5 of the act (act April 26, 1906, c. 1876, 34 Stat., 138), provides:

"'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to, and vest in, his heirs, and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs, or lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

"Here is an express declaration by Congress that the land shall descend to the heirs the same as it would have descended if the patent or deed had issued to the allottee during his life; and it is declared that allotment for allottees who have died, shall also

thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

Further along in the opinion it is said:

"While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had, at all times, belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment, here involved, was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first provides on the one hand to ascertain the membership of the tribe and on the other, the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them."

In another part of the opinion it is said:

"It is urged that the land in question is not 'inherited' land. For reasons already explained, that contention, while technically right, is substantially wrong. The scheme of the statute clearly indicates that the land was to be regarded the same as if it had been inherited. No sound reason can be adduced for treating these lands otherwise than they would have been treated if Andrew J. Berryhill had survived long enough to receive the allotment.

"This interpretation is further supported by the provision of the several acts dealing with these allotments."

In Gray *vs.* Coffman, 10 Federal Cases, 1003; 3 Dillon, 393, the court had before it a statute, in our judgment, substantially the same in essential parts as the treaty under consideration. A right was given to a certain number of acres of land, such land being unsurveyed and unselected. It was

held that the Indian had such an interest in this land that he could convey the same by will. And in passing on the question say:

> "The effect of this would be that the legal title is still in the United States, and, of course, the plaintiff could not recover in ejectment. But this point, I leave undetermined, preferring to rest my judgment upon the ground that under the circumstances, the court must give effect to the well-established laws, customs and usages of the Wyandot tribe of Indians, in respect to the disposition of property by descent and will. John Hicks, Sr., had a valuable right given by the treaty of 1842—a right to select and locate 640 acres of land—not land but a 'float,' or right to land. He died in 1853 within the limits of what afterwards became the territory of Kansas. There is no national law of descent and wills, none regulating the rights of members of Indian tribes. The treaty of 1855 recognizes and provides in several places for the rights of heirs or legal representatives of the reservees under the treaty of 1842. These must mean heirs and legal representatives 'according to the laws, usages and customs' of the tribe. See articles 8 and 9 of treaty of 1855. The Government was aware that between 1842, when the right was given, and 1855, when the second treaty was made, that some of the reservees had died, and provided carefully for this contingency by authorizing their heirs or legal representatives to select and locate the section of land. It is hardly possible to suppose that Congress meant to refer to the law of Missouri Territory of 1815, to ascertain who were the heirs or legal representatives of the deceased reservees. There is but one way to determine this, and that is by the laws, customs and usages of the tribe. If this is so, then the will of John Hicks, Sr., made and allowed in 1853, was valid and gave the right to his sons, John, Jr., and Francis A. If the will of the elder Hicks is valid, so likewise is the will of Francis A., whose death occurred previous to the enactment of any statute of wills or descents in Kansas, but after the ratification of the treaty of 1855."

In Doe *ex Dem.* Man *et al. vs.* Wilson, 23 Howard, 461; 16 L. Ed., 584, this court discussed the question of what character of title a certain Indian chief got under a treaty reserving to him two sections of land in a certain designated territory, to be thereafter surveyed and selected. The court says the treaty provides:

> "'That the foregoing reservation shall be selected under the direction of the President of the United States after the land shall have been surveyed and the boundaries shall correspond with the public surveys.'"

Prior to any survey or selection of the land, the Indian chief made a deed in fee simple, describing the land as the land reserved to him under the treaty and under this deed the defendant in the action held possession. Plaintiff took a subsequent deed from Petchico's (the chief's) heirs on the assumption that their ancestor's deed was void, he being dead before the land was surveyed or selected. In passing on this question, the court says:

> "The only question presented by the record that we feel ourselves called upon to decide is whether Petchico's deed, of February, 1833, vested his title in Coquillard and Colerick. The Pottawatomie Nation was the owner of the possessory right of the country ceded, and all subjects of the Nation were joint owners of it. The reservees took, by the treaty directly from the Nation, the Indian title, and this was the right to occupy, use, and enjoy the land in common with the United States until partition was made in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians, as a Nation, reserved no interest in the property ceded. As a part of the consideration for the cession, certain individuals of the Nation had conferred on them portions of the land to which the United States' title was either added or promised to be added, and it matters not which for the purposes of this controversy for possession. The United States held the ultimate title, charged with the right

of undisturbed occupancy and perpetual possession of the Indian and with the exclusive power in the Government of acquiring the right. Although the Government alone can purchase lands from the Indian Nation, it does not follow that, when the rights of the Nation are extinguished, the individual of the Nation, who takes as private owner, cannot sell his interest. The Indian title is property and alienable, unless the treaty had prohibited its sale. So far from this being the case in the instance before us, it is manifest that the sales of the reserved sections were contemplated as the land ceded, were forthwith to be surveyed, sold and inhabitated by the white population, among whom the Indians could not remain.

"We hold that Petchico was a tenant in common with the United States and could sell his reserved interest; and that when the United States selected the land reserved to him and made partition, of which the patent is conclusive evidence, his grantees took the interest he would have taken if living."

In Clark *vs.* Lord, 20 Kansas, 390, the Supreme Court had before it, for construction, the treaty of the Ottawas, for the purpose of determining whether such treaty vested an estate of inheritance in the members of such tribe. Article 3 of the Ottawa treaty of 1862 is as follows:

"It being the wish of said tribe of Ottawas to remunerate several of the chiefs, councilmen and headmen of the tribe for their services to them many years without pay, it is hereby stipulated that five sections of land are reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen and headmen as the members of the tribe shall in full council determine; and it shall be the duty of the Secretary of the Interior to issue patent in fee simple of said lands when located and apportioned to said Indians. In addition thereto, said last-named persons and each and every head of a family of said tribe shall receive 160 acres of land which shall include his or her house, and all improvements so far as practicable; and all other members of the tribe shall receive eighty acres of land,

> and all the locations of the heads of families made in accordance with this treaty shall be made adjoining and in as regular and compact form as possible, and with due regard to the rights of each individual and of the whole tribe."

In passing on the question the Supreme Court of Kansas say:

> "The main questions involved in this case are: First. Did Eliza Richardson, a member of the Ottawa Tribe of Indians, who, if she had lived till the first of December, 1865, would have been entitled to a patent from the United States for the land in controversy, have at the time of her death, in the fall of 1862, an inheritable estate in such land? Second. Do the restrictions upon alienation, contained in the seventh article of the Ottawa treaty of 1862, apply to the heirs of said Eliza Richardson if she had such an inheritable interest? Eliza Richardson was included in that class, who, under the denomination of 'all other members of the tribe' was to receive eighty acres of the land each, under article 3 of said treaty."

The court then sets out article three of the treaty, hereinabove quoted, and continuing, says:

> "The treaty was proclaimed July 28th, 1863. Eliza Richardson died in the fall of 1862. The patent was issued to her heirs on the 1st of December, 1865, for the eighty acres in suit. Within the authorities, the absolute right to eighty acres of land in reserve passed immediately to Eliza Richardson upon the ratification of the treaty and the title to the specific eighty acres in controversy, when selected and approved in the manner provided in the treaty, became absolute and perfected in her heirs upon her decease. Doe *vs.* Wilson, 28 Howard, 457; Forsythe *vs.* Vallance, 6 McLean, 562. The case of the reserve in Doe *vs.* Wilson, *supra*, is so similar to the case of Eliza Richardson that it is unnecessary to recite the reasons and arguments upon which the conclusion is based."

Further along, in its opinion, the court says:

> "The patent was not issued to Eleanor Richardson but to 'the heirs of Eliza Richardson,' and said Eleanor Richardson obtained her interest, not as an allottee nor as the patentee, but by virtue of the laws of the State of Kansas, which authorized her, as an heir of Eliza Richardson, to inherit the estate of her sister. If Eliza had lived, the lands would have been allotted and patented to her. After her death, they were patented to her heirs without naming them, and the laws of the State determined who these were. Eleanor simply inherited the lands granted to Eliza during her life, and the patent is evidence of partition of the lands and the division made in pursuance of the treaty. The death of Eliza did not change the terms and conditions of the treaty nor annul the grant to her. But as the patent could not issue to a dead person, it was necessarily issued to the heirs of Eliza. But such heirs were not controlled by the restrictions applicable to the allottees and patentees. If the patent had been issued to Eliza during her lifetime, her death would have abrogated the restriction on the alienation of the land, and having issued after her decease, it placed the heirs in the same condition as to their rights in the property, as if issued before."

In Brown *vs.* Belmarde, 3 Kansas, 35, the Supreme Court of Kansas had before it, for determination, the question when the heirs, as that term is used, in acts of Congress, granting lands is to be ascertained, whether such heirs are to be ascertained at the time of death or at the time of the going into effect of the act of Congress making the grant, and in passing on the question, the court say:

> "Assuming, as above indicated, that the act of Congress operated as an original grant and that the words 'heirs of deceased reservees' are merely *descriptio personæ*, the question is of comparatively easy solution. Had Lavonture been living at the time of the passage of the act, the title would have

vested in him, and if he had died the next day, there can be no question that his heirs would have been determined by the law of the State at the time of his death, and it would have made no difference if he had lived for a year and the law of descent had been changed in the meantime. The law at the time of his death would have furnished the rule. And why? Not simply because of his death at that particular time, but because that was the time at which the estate would pass. The law at the time the estate passes furnishes the rule. To illustrate: Suppose there was on a certain day conveyed to a man a life estate in a certain piece of property, then to go to his heirs generally and at the time of the conveyance the law would, in case of his death, give one-half to his brothers and sisters and the other half to his children, but before he dies the law is changed so as to give the whole to his children. Would there be any question as to the right of his children to the whole property? Certainly not. Because the word 'heirs' in the deed would be construed with reference to the statute in force at the time the estate would pass, and not with reference to the law at the time the deed was executed. So, in the case at bar. The whole title being in the United States, passed on the 26th day of May, 1860, the date of the approval of the act of Congress, and whoever at that time would inherit from Lavonture, under the law of the State, are the heirs referred to in the act.

"Our conclusion, therefore, upon this branch of the case is: That the persons, who, under the laws of the State, would have inherited the real estate of Lavonture had he died on the 26th day of May, 1860, are the persons to whose benefit the grant made by the act of Congress of that date inured."

Applying the doctrine of the above case to the facts in the case at bar, it is evident that the title to the land in question would pass to those persons designated by the Creek law as the heirs of Ellis Grayson on May 25, 1901, the same as if Ellis Grayson had been alive on that day, received the land and died possessed of it. Under the Creek

law, William Sizemore and Jeanetta Newberry, and Foil M. Brady were the heirs of Ellis Grayson.

In Irving *vs.* Diamond, 100 Pacific Reporter, 557, the Supreme Court of Oklahoma had this specific treaty before it for consideration. The facts in that case, as shown by the opinion, were: That Edward Irving was born on the 26th day of December, 1895, and died intestate on the 16th day of August, 1900. He was duly enrolled by the Dawes Commission upon the freedmen roll of the Creek Nation, and after his death and on October 6, 1902, there was allotted in his name and a deed or patent executed to the tract of land in dispute. At the time of his death, there survived him his father, George Irving; his mother, Mary Irving, and six (6) brothers and sisters. Mary Irving, the mother of Edward Irving, died intestate on the 26th day of September, 1902, leaving her husband and the six brothers and sisters of Edward Irving above mentioned surviving her. The father of Edward Irving, the husband of Mary Irving, and some of the brothers and sisters above mentioned, conveyed the land to Wallace B. Diamond, and an action for partition was brought on the theory that the father and the children above mentioned jointly owned the land.

The court, after setting out section 28 of the Original Creek Agreement and the law of the Creek Nation as to descent, held that the land in question on the death of Edward Irving descended to his mother as his sole heir under the Creek law, and say:

> "This section of the Creek law has already received a construction at the hands of this court (De Graffenreid *vs.* Iowa Land and Trust Company, 95 Pac., 625), and in that case it was held that the mother under the Creek law, was the nearest relation. So that on the death of the allottee in this case, the mother took his entire estate and property in this land, upon its being segregated and allotted to him or in his name. She held and owned this land at the time of her death September 26, 1902."

In Hayes *vs.* Barringer, 168 Federal, 221, the Circuit Court of Appeals, Eighth Circuit, had before it for consideration the Chickasaw and Choctaw treaty, and for determination whether prior to allotment the citizens of such tribes had an interest in the land which could be devised by will. In its opinion the court say:

> "At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and while the enrolled members of these tribes undoubtedly had a vested, equitable right to their just shares of them against strangers and fellow-members of their tribes, they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States, or of the Indian Nation."

Further along in its opinion, after reviewing the treaty and the provisions thereof regarding the restrictions on alienation, the court say:

> "Nor do all the terms of the restrictions contained in the acts and agreements, when read and construed together, either convince or indicate that the intention of the parties to them was to forbid or limit conveyances, sales and gifts *inter vivos* only. They disabled the allottees, it is true, from affecting the title to their lands for limited times by deeds, debts or obligations of any character (section 15), but they also declare that these lands shall not be alienable within the terms specified (sections 12-16). Nor is this all. They expressly provide that where, as in the case of the testatrix here, the enrolled person dies subsequent to July 1, 1902, and before receiving an allotment, her lands shall descend to her heirs, according to the laws of descent and distribution, as provided for in chapter 49, section 22, of Mansfield's Digest. When this section was adopted, there were laws of the Chickasaws and Choctaws which governed

the disposition of the property of their deceased members by devise and by descent in absence of a will. There were laws of the State of Arkansas in Mansfield's Digest which provided for the disposition of property by will (chapter 155, Mansfield's Digest, sections 3562-3622, Ind. T. Ann. St., 1899), and by descent and distribution (chapter 49). The United States and the Chickasaw and Choctaw Nations selected the last chapter from these various laws and agreed and enacted that lands allotted to an enrolled member of the Chickasaw or Choctaw tribe after his death should descend to his heirs, as provided in that chapter, and there is no rational or logical escape from the conclusion that the lands in controversy in this case so descended. The equitable right to receive a just share of the lands of these Indian Nations, which the testatrix had when she made her will was ineffectual to deprive her heirs of it, or the lands derived from it. * * *

"The opinion of Judge Dillon in Gray *vs.* Coffman, Fed. Cas. No. 5714, cited by counsel for plaintiff, has not been overlooked. Judge Dillon there held that a will of a Wyandot Indian, made and probated according to the laws of the Wyandots, before any statute of wills or of descent and distribution had been enacted by the Legislature of the Territory of Kansas, was effectual to convey the testator's absolute right to select and to receive a patent to a section of land 'never to be conveyed' by him 'without permission of the President of the United States,' that decision is inapplicable to the case in hand because the restriction in that case was on 'conveyance,' and in this it is on 'alienation,' and because in that case there was no act of Congress, agreement or statute other than the laws of the Wyandots prescribing the disposition of property upon the death of the Indian testator, while in this case there is an act of Congress embodied in an agreement between the United States and the Indian Nation, that the right to this land and the land itself shall descend to the heirs of the testator, as provided in chapter 49 of Mansfield's Digest."

Here we have express judicial recognition of the fact that the right to an allotment descends, that is, such right is a vested and inheritable estate. This right, as well as the land itself, is expressly recognized as a subject of ownership and of transmission by inheritance.

It is evident from a consideration of the above case that the Circuit Court of Appeals, Eighth Circuit, except for the fact that the Chickasaw and Choctaw treaties contained a restriction against alienation, and not merely against conveyance, and that the word "alienation" was sufficiently broad to include a devise by will, and except for the further fact that the treaties put in force the statute of descent and distribution of Arkansas and did not put in force the Arkansas statutes of wills and provided that the land should descend according to the Arkansas statute of descent and distribution, thereby evincing an intention that the land should only descend in accordance with the statute of descent and distribution and not be otherwise disposed of, would have held that Sarah Hayes St. John, the Indian whose allotment was in dispute, had such an interest in such allotment before its selection that she could dispose of by will.

It is, we think, conclusively shown by the court's reasoning that a right to select an allotment is a vested right and capable of transmission by devise, except that the restrictions against alienation contained in the treaties prevent and preclude such a disposition of the right.

In Turner *vs.* Fisher, 222 U. S., 204, the Supreme Court say:

> "Where under the provisions of acts of Congress and after a hearing, the names of relators were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired, of which the freedmen could not be deprived, without that character of notice and opportunity to be heard, essential to due process of law."

In Mullen *vs.* The United States, 224 U. S., 448, the court had before it for consideration section 22 of the Choctaw and

Chickasaw Agreement, and in passing on the effect of such section say:

> "While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from inherited lands. No distinction is made between the heirs; they might or might not be members, of the tribe, and where there were a number of heirs, each would take his undivided share. * * *
>
> "In the agreement with the Creek Indians (act of March 1, 1901, 31 Stat., 861, 870, c. 676), it was provided, that in case of the death of a citizen of a tribe after his name had been placed on the tribal rolls made by the Commission, and before receiving his allotment, the land and money to which he would have been entitled, if living, should descend to his heirs 'and be allotted and distributed to them accordingly.' The question arose whether in such case there should be a designation of a portion of the allotment as a homestead.
>
> "In an opinion, under date of March 16, 1903, the then Assistant Attorney General of the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: 'After a careful consideration of the provisions of law, pertinent to the questions presented, and of the views of the Commissioner of Indian Affairs and the Commissioner to the Five Civilized Tribes, I agree with the latter that in all cases where an allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed, but that where the allotment is made directly to the heirs of the deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heir a separate deed for any portion of the allotment, and, therefore, advise the adoption of that rule.'
>
> "It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement, the allotment

> was to be made in the name of the deceased member, and to 'descend to his heirs.' This, however, is a mere formal distinction and implies no difference in substance. In both cases, the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs, furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

It is true it appears that the lands involved in the above case had been allotted, but this does not affect the reasoning of the court, as the court was ascertaining the right to an allotment, conferred by section 22 of the treaty under consideration, on the heirs of the deceased Indian citizen. And it says, "the lands were to go immediately to the heirs." If the lands were to go "immediately to the heirs," it follows that the treaty amounts, or is equivalent to a grant and that the selection of land is merely a ministerial act which determines the corpus of the grant, identifies the thing granted, brings within the terms of the grant the lands selected.

If the lands went "immediately" to the heirs of Ellis Grayson, it is evident that the treaty amounted to a grant to the heirs of Ellis Grayson as a class at the time of his death, or, if not, then to such heirs as a class at the time the treaty went into operation, the heirs to be ascertained under the Creek law. The heirs of Ellis Grayson being the same at each date it is immaterial to determine whether the heirs are to be ascertained as of the time of the death of Ellis Grayson, or ascertained as of the time of the going into effect of the treaty.

In the case of Goodrich *vs.* O'Connor, 52 Texas, 375, the Supreme Court of that State held that where an act was passed by the legislature of Texas in 1856, granting to the "heirs of Charles H. Hardwick" a tract of land, that the grant was to those persons who were the heirs of Charles H. Hard-

wick at the date of his death, which was in 1836, and not to the persons who would be his heirs under the laws in force at the time of the passage of the act, and the doctrine announced in this case has become the settled rule in the State of Texas, and upheld by the subsequent decisions of that State.

In Henry Gas Company *vs.* United States, 191 Federal, 137, the court say:

> "The enrollment of this minor conclusively determines her right to participation in the distribution of the Tribal property of the Cherokee Nation."

This certainly recognizes that on enrollment an Indian citizen becomes vested with a valuable property right, and where this right is not exercised prior to death, by the express provisions of the law creating the right, such right descends to the heirs of the enrolled citizen. A property right is ordinarily subject to transmission by descent or devise. There can be no doubt as to this right being the subject of descent in this particular case, for by the express language of the law, it is made to "descend" and the heirs are to hold and enjoy it to the same extent and with like effect as if the deceased enrolled Indian citizen had died seized and possessed of the allotment which descends to the heirs.

In Drew *vs.* Carroll, 28 N. E., 148, the Supreme Judicial Court of Massachusetts had before it the question of the interest of an individual Indian in lands which were to be set aside and partitioned to individual members of the tribe, before such partition took effect, and in passing on the question, say:

> "Previously all the common lands had been held and controlled by the commonwealth for the benefit of the Indians, who were treated as wards of the State. The State recognized only certain equitable rights of ownership in the Indians, and it kept their property and exercised a guardianship over them to protect them from the consequences of their own imprudence. Mayhew *vs.* Gay Head, 13 Allen, 129;

Danzell *vs.* Webquish, 108 Mass., 133; *In re* Coombs, 127 Mass., 278; Pells *vs.* Webquish, 129 Mass., 469; Brown *vs.* Wenham, 10 Metc. (Mass.), 495; Lynn *vs.* Nahant, 113 Mass., 433, 449. The statute above referred to put them, for the most part, on the basis of ordinary citizenship. It gave them all the rights of citizens, and confirmed their titles to their individual property. In regard to lands held in common, it made an exception of the Indians of Marshpee and Gay Head, and continued the State ownership and control of their common lands for their benefit until the passage of St. 1870, c. 293. *In re* Coombs, 127 Mass., 278. As to all others, it gave every Indian a right immediately to have his share of the common lands of the tribe set out to him or sold for his benefit. At the same time it gave him a right to have his share in any funds or other property held in trust for the tribe paid over to him. A method was provided through which his title might be established. Commissioners were to be appointed by the Probate Court, who were to act under the direction of the court, and determine all necessary questions, and make their report, on which the court should make its order or decree. Any person deeming himself aggrieved might appeal to the Supreme Judicial Court. As soon as this statute took effect, every Indian belonging to the Herring Pond tribe had precisely the same kind of right in the lands of the tribe that an ordinary tenant in common has in the lands held by himself and his co-tenants. He had a right on application, to have his share set off to him, to be held in severalty, unless the commissioners should adjudge that it was for the interest of the owners to have it sold, and in that case he was entitled to his share of the proceeds. Under our general laws, any tenant in common is liable to be compelled to receive his share of the proceeds of the sale of the lands held in common if the court deems a sale advantageous to the parties. Pub. St., chapter 178, sec. 165. We can see no particular in which the right of an Indian in the common lands of the Herring Pond tribe, under St. 1869, chapter 453, differed from the right of other tenants in common. The difference in procedure in determining his in-

> terest does not affect the nature of that interest. His right was vested and enforcible the moment that the statute took effect. That he had from that time an equitable right of which he c uld not be deprived can hardly be questioned. It seems to us better and more consistent with the purpose of the statute to hold that he had a legal right as well. His legal title was not created by the decree of the Probate Court, but it was created by the statute, and only declared by the decree of the court on the report of the commissioners, according to the facts."

The proper construction, it seems to us, to place on section 28 of the Original Agreement, the rational, the common-sense construction, the construction Congress evidently intended, the construction that carries out and effectuates the purpose and design of Congress, is that a citizen under the treaty entitled to an allotment who dies without receiving the same should be considered, so far as the transmission of the allotment is concerned, to all intents and purposes as if he had died possessed of the allotment afterward selected, and that said allotment, or the right to it, should descend as if such deceased had in fact died possessed and seized of the allotment. Thus treated, it is plain that we should consider the allotment as having been made in Ellis Grayson's lifetime, and that when he died, March 1, 1901, he died seized and possessed of the same and that on his death it passed to his heirs then in being.

This seems to us to be the proper rule and the rule applied in Ground *vs.* Dingman, 127 Pac., 1078, by the Supreme Court of Oklahoma. In that case the court say:

> "We are, therefore, of the opinion that, as Susan Thompson was a citizen of the Creek Nation, living on April 1, 1899, and was enrolled as such and died before receiving her allotment, the devolution thereof fell squarely within the provisions of section 28, *supra*, which means that on the happening of that event, notwithstanding the fact that she could not and did not die seised therein of an estate of inheritance, that the lands went to her heirs, *in esse*,

> at the time of her death, as designated by and according to the laws of descent and distribution of the Creek Nation, precisely in the same manner as though she had died seised thereof. It follows that under the Creek law made applicable by said section and construed by us, in the De Graffenreid case and the Barnett case, *supra*, that at the time of her death the allotment of Susan Thompson went one-half to the father, Charles Stidham, and one-half to their infant son, and that upon the death of the latter, the whole estate went to the father, and upon the death of the father, to the plaintiffs as his sole heirs at law."

The distinguishing feature between the Ground-Dingman case and the case at bar is that in the one case the allotment was selected in May, 1901, and in the other August 23, 1902. This difference appears to us to be immaterial, for if the unselected allotment of Susan Thompson was to be treated "precisely in the manner as though she had died seised thereof," it follows that the unselected allotment of Ellis Grayson must be treated "precisely in the manner as though he had died seised thereof," and "that the lands went to his heirs *in esse* at the time of his death." It necessarily follows, that if Susan Thompson in the Ground-Dingman case is to be treated as if she had died possessed of the allotment selected in her behalf after her death, then the allotment is to be treated as if in fact it had been selected by, and a deed thereof issued to, her in her lifetime, and the title she died possessed of transmitted to her heirs, *in esse*, at the time of her death.

This rule would likewise have to be applied to Ellis Grayson and on being so applied, it follows that we should treat the questions for determination in this case as if Ellis Grayson had in his lifetime selected as his allotment the land involved in this suit, and after so selecting it had died seized and possessed thereof, and transmitted it to his heirs, *in esse*, such heirs to be ascertained under and by the Creek law.

If we are in error in assuming that Congress intended the unselected allotment of a Creek citizen, entitled to such allotment but who died before receiving it, to descend as if in fact the allotment had been selected by, deeded to, the citizen and he had died possessed thereof, then it seems to us to follow that the heirs of a deceased Indian citizen who dies without receiving his allotment, take the allotment, such deceased citizen would have been entitled to if he had lived to receive it, as purchasers in the first instance, and would take and hold such allotment immediately and directly from the United States and the Creek Nation and not mediately.

If it be true, as held by the Supreme Court of Oklahoma, that Ellis Grayson had no interest in the allotment to be selected, then it follows there was no interest to be transmitted by inheritance, and hence, that the word "descend," as used in the treaty, means to go to, to go down, vest in, inure to, pass to, to go to the benefit of, and so is a word of purchase and not of inheritance.

Tate *vs.* Townsend, 16 Miss., 316.
Johnson *vs.* Norton, 10 Pa. Stat., 245.
Borgner *vs.* Brown (Ind.), 33 N. E. Rep., 92.
Doren *vs.* Gillum (Ind.), 35 N. E. Rep., 1101.
Brooks *vs.* Kip (N. J.), 35 Atl. Rep., 658.
Ballentine *vs.* Wood (N. J.), 9 Atl. Rep., 582.
Aytlett *vs.* Swope (Tenn.), 17 S. W. Rep., 208.
Halstead *vs.* Hall, 60 Md., 209.
Barclay *vs.* Cameron, 35 Tex., 242.
Stratton *vs.* McKinne (Tex.), 62 S. W. Rep., 636.
Meadowcroft *vs.* Winnebago Co. (Ill.), 54 N. E. Rep., 949.
Starr *vs.* Hamilton (U. S.), 22 Fed. Cas., 1107.
Spangenberg *vs.* Guiney, 3 Ohio Dec., 163.
Hall *vs.* Russell, 101 U. S., 503.

If we treat the word "descend," as used in the original treaty, as not creating an estate of inheritance and not importing that the allotment to be selected after death should

be treated as selected before death, it is evident that such word then becomes a word of purchase, and the heirs of the deceased Indian allottee would be entitled to take directly from the Government as a class. And the heirs, if more than one existed, would all take equally regardless of the share or proportion such heirs or heir would have taken had the title vested by descent.

McCrea's Appeal (Pa.), 36 Atl. Rep., 412.
Auman *vs.* Auman, 21 Pa. St., 348.
Leathers *vs.* Gray (N. C.), 2 S. E. Rep., 455.
Ward *vs.* Stow (N. C.), 27 Am. Dec., 239.
Starnes *vs.* Hill, 112 N. C., I.
Durbin *vs.* Redman (Ind.), 40 N. E. Rep., 133-134.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Fabens *vs.* Fabens (Mass.), 5 N. E. Rep., 650.
Hobbie *vs.* Ogden (Ill.), 53 N. E. Rep., 106.
Brown *vs.* Belmonde, 3 Kan., 40.
Haun *vs.* Martin (Ore.), 86 Pac. Rep., 371.
Walker *vs.* Ehresman (Neb.), 111 N. W. Rep., 219.
Aspey *vs.* Barry (S. D.), 83 N. W. Rep., 91.
Gould *vs.* Tucker (S. D.), 105 N. W. Rep., 624.
Burke *vs.* Modern Woodmen of America (Cal.), 84 Pac. Rep., 275.
Cooper *vs.* Wilder (Cal.), 43 Pac. Rep., 590.
Wittenbrook *vs.* Wheadon (Cal.), 60 Pac. Rep., 664.

Whether the heirs of Ellis Grayson be treated as taking by descent or as taking by purchase, in either event it is evident they had a vested estate in the allotment to be selected, and this right could not be divested by subsequent legislation, as this would be taking property without due process of law, and would be beyond the legislative power of Congress.

Donivan *vs.* Pitcher, 53 Ala., 411; 25 Am. Rep., 634.
Rock Hill College *vs.* Jones, 47 Md., 1.
White *vs.* Martin, 66 Tex., 340.
Jumbo Cattle Co. *vs.* Bacon, 79 Tex., 5.
Jackson *vs.* Lyon, 9 Cowan, 664.
Gilmore *vs.* Morrill, 8 Ver., 74.

Undoubtedly, the foremost idea in the mind of the Indians was that the treaty provided for the dissolution of tribal relations, the division of its property, and that each Indian would receive and did receive, by such treaty, his aliquot part of the tribal lands, became vested with an estate therein, and, if living at the time of the treaty and dying before allotment, would transmit his estate, or aliquot part of the tribal lands, to his heirs; that, if dead at the time of the treaty going into effect, the heirs of such Indian, under the Creek law, would be vested with a like estate and capable of transmitting it to his heirs.

It is, it seems to us, impossible, in view of the purposes that Congress and the Indians had in mind—the purposes sought to be accomplished by the treaty, the conditions surrounding the Indians—to come to the conclusion that, into the unskilled mind of the Indians, there ever came the thought that, after the ratification of the treaty, there was any act necessary to be done in order to vest title, or in order to be enabled to transmit by inheritance title to the allotment to his descendants, or that he ever deemed any other act on his part necessary than to make a selection, for the purpose, not of vesting title or receiving the grant or bounty from the Government and the nation, but, merely to identify and individualize the grant already made, title to which was already vested in him. In other words, the Indian deemed that he had been granted title to a certain amount of land out of a larger body of land, was vested with title to the amount granted to him, and all that was necessary for him to do, in order to enjoy the full benefits of the grant, was to select from the larger body of land the quantity granted him.

If we are correct in this assumption, then it follows that the treaty should be construed in the light of this understanding, for, as said by this court in Jones *vs.* Meehan, 175 U. S., 1, 11:

> "In construing any treaty between the United States and an Indian tribe, it must always (as pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted on

> the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people who have no written language and are wholly unfamiliar with the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty, therefore, must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

We cannot conceive any material difference between the language of this treaty, which provides that there shall be allotted to each member of a tribe who meets the requirements of a treaty a body of land, and those treaties, which provide that there shall be granted, or that there shall be reserved, to certain Indians meeting the requirements of the treaty a certain body of land, and this court has, in numerous cases, held that, where language equivalent to that last mentioned is used in treaties with Indians, it amounts, in substance, to a grant, and vests title in the Indian which he can transmit by devise to his heirs, and which, in the absence of devise, the law by inheritance would transmit to such heirs a title which, in the absence of restrictions and provisions to the contrary, he could sell, and sell before the subject-matter of the grant was selected and segregated.

In United States *vs.* Brooks, 10 How., 42, 460, it appeared that the Caddo Indians had given to certain persons a right to a portion of their lands lying in Louisiana, which lands had not been selected and identified at the time of the treaty. The supplement to the treaty provided:

> "It is agreed that the legal representatives of Francois Grappe, deceased, and his three sons, Jacques,

> Dominique, and Balthazar Grappe, shall have their right to said four leagues of land reserved for them and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo Nation of Indians, as expressed in the treaty to which these articles are supplemental, and the said four leagues of land shall be laid off in one body in the southeast corner of their lands, ceded as aforesaid, and bounded by the Red River four leagues, and, by the Pascagoula Bayou, one league, running back for quantity from each so as to contain four square leagues of land in conformity with the boundaries established and expressed in the original deed of gift made by said Caddo Nation of Indians to the said Francois Grappe and his three sons, Jacques, Dominique, and Balthazar Grappe.'

In passing on the effect of the above provision this court said:

> "We think that the treaty gave to the Grappes a fee-simple title to all the rights which the Caddoes had in these lands as fully as any patent from the Government could make one. The reservation as to the Grappes, 'their heirs and assigns, forever,' creates as absolute a fee as any subsequent act upon the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title. Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienors would have done."

In Crews *vs.* Burcham, 1 Black., 352, the Pottawatomie tribe of Indians had ceded their lands to the Federal Government, except certain reservations, for which patents were to be issued. These reservations would be selected under the direction of the President after the land was surveyed. Francis Besion, a member of the tribe, was a reservee of one-half section of land under this treaty. Besion sold this land prior to the issuing of the patent, and prior to the selection of the land, in accordance with the treaty. The effect

of the treaty, and of such sale, was before this court for consideration. In passing on it, the court say:

> "The main and controlling questions involved in this case were before this court in the case of Doe *vs.* Wilson, 23 How., 457, which arose under a reservation in this treaty in behalf of the chief, Pet-chi-co. It was there held, that the reservation created an equitable interest to the land to be selected under the treaty, that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed upon the selection of the land and the issue of the patent, operated to vest the title in his grantee. It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. * * * The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the Government."

In Prentice *vs.* Stearns, 113 U. S., 435, this court quoted from Crews *vs.* Burcham, *supra*, as follows:

> "We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the President, after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified, to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to

this covenant on the issuing of the patent within the meaning of this act of Congress—that is, the act of May 20, 1836, 5 Stat. L., 31. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime."

In Best *vs.* Doe, 18 Wall., 112, the Chickasaw treaty provided for certain reservations of lands to Indians twenty-one years old not heads of families, a list of whom was to be made out by seven chiefs named in the treaty and filed with the agent, and upon his, the agent's, certificates of its believed accuracy, the register and receiver of the United States Land Office were to cause such reservations to be located. On the trial, it was pretended that the right given by the treaty was a mere float, and a float in a double sense—in that neither the land which was to become the object of the gift was identified, nor the beneficiary of the gift ascertained. This court, in passing on the question, say:

"In order to carry out, in good faith, Indian treaties, effect must be given to the intention of the parties to them; and, from this short recital of the different provisions of these treaties which are applicable to this case, no well-founded doubt can exist to the proper construction to give to the sixth article. The cession in the first treaty contemplated the ultimate abandonment of the lands by the Indians. This treaty did not prove satisfactory and the Indians asked, and the United States ceded to them, a limited quantity of land, for a permanent home. This object could not be obtained if it were meant to give only an equitable title to the Indians. Such a title would soon become complicated by the encroachments of the white race; and that the Indians supposed they were providing for a good title to their 'reservations' is manifest enough, because they declare, in the second treaty, that they wish to have the management of their affairs in their own hands. * * * Can it be doubted that it was the intention of both parties to the treaty to clothe the reservees with a full title? If it were not so there would have

been some words of limitation indicating a contrary intention. Instead of this there is nothing to show that a further grant, or any additional evidence of title was contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by the act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them. This was the view taken of this subject by the highest court of Mississippi soon after this treaty went into operation, in litigations which arose between the white race and the Indians themselves concerning the effect to be given to these reservations. In all these cases the Indian reservee was held to have preference over the subsequent patentee, on the ground that the United States had parted with the title by the treaty."

In Jones *vs.* Meehan, 175 U. S., 1, article 9 of the treaty before the court's consideration was as follows:

"Upon the original request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief River, for the chief, Moose Dung, and a like reservation of six hundred and forty acres, for the chief, Red Bear, on the north side of Pembina River."

The effect of this reservation came before the court for consideration, and this court, after reviewing the United States cases hereinabove quoted from, and many others, say:

"The clear result of this series of decisions is that when the United States, in a treaty with an Indian Tribe, and as a part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future; the treaty itself converts the reserved sections into individual property; the reser-

> vation, unless accompanied by words limiting its effect, is equivalent to a present grant or a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

In Niles *vs.* Anderson, 5 How. (Miss.), 365, 383; Wray *vs.* Doe, Houapanubby, 10 Smedes & M., 452 461, the Supreme Court of Mississippi, construing the Chickasaw treaty before this court, in Best *vs.* Doe, in passing on the treaty, say:

> "By this language a title in fee passed to such persons as were above the age of twenty-one. The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed."

In another place, the court say:

> "The treaty has not contemplated a further grant or other evidence of title, showing conclusively that, by the terms used, it was intended that a perfect title was thereby intended to be secured; the Indian then, under whom the complainants claim, had, in herself, an absolute and unconditional title in fee simple. The title was conferred by the treaty. It was not, however, perfected until the location was made. Location was necessary to give identity. The location, it seems, was duly made, and, thus, the title to the land in controversy was consummated by giving identity to that which was before unlocated."

The above quotations from the Mississippi court are cited in full, with approval, in Jones *vs.* Meehan, *supra*. A careful perusal of the opinion of this court, in Jones *vs.* Meehan, leads, inevitably, to the conclusion that there is no difference in the terms "hereby allotted," "to be allotted," "hereby reserved," "to be reserved," "hereby granted," "is granted," "there shall be granted," "and there is given," as these terms

are used in Indians treaties; that all such terms, and other terms of like effect, when used in treaties with Indians, are to be considered as vesting title to the Indians in the lands in the treaty described, or lands to be thereafter surveyed, located, and selected—the treaty conferring title, the selection and location having the office, only, of identifying the particular subject-matter, or, rather, boundaries, of the thing already granted.

The reasoning upon which the Supreme Court of Oklahoma proceeds in its opinion in this case is based, in part at least, on the assumption that there can be no grant of land or right to land, or estate of possession or inheritance in land where there is no designation, severance or segregation of the particular land, the subject of the grant or right from a larger body, and that it is the selection or segregation of the land that renders it subject to individual ownership.

This reasoning is contrary to the opinions of this court, herein cited, and entirely ignores, or overlooks, the fact that under the Indian treaties a property right, independent of actual selection of a specific tract of land, exists, namely, the right to share in the tribal lands and funds. This right, upon the death of the ancestor, if death takes place before allotment, is not lost but passes immediately to those persons who meet the treaty description of heirs.

A construction that ignores this right is too narrow and is contrary to the evident purpose and intention of the treaty, is contrary to the uniform construction of the Interior Department and gives rise to inexplicable perplexity and confusion. To illustrate: If no right exists until distribution of funds and selection of land, and the land is selected in different parcels and on different dates, as is often the case, there might be as many different heirs as separate selections. There might be one set of heirs entitled to lands, another set to the funds. If the tribal funds should be distributed in instalments, as can and may be done, the result might be payments at different times to different sets of heirs, making it necessary for the Department officers at the date of each

fragmentary selection of land, or partial distribution of funds, to determine the personnel of the heirs entitled to make the selection of land, or to receive the funds to be distributed.

The unbroken practice of the Department has been, and we are informed now is, to hold title passes on death to heirs in all cases where death occurred prior to allotment; the heirs of the deceased Indian, who but for death would have been entitled to receive an allotment, to be ascertained as of the date of death of such Indian under the law existing at the time of such death. This practice amounts to an administrative construction of the treaty by that Department intrusted with its execution and its interpretation in the first instance and should not be set aside, except for the weightiest reasons. Under it, thousands of patents have been issued and numberless persons are in possession of land, deeming themselves to be lawful owners and dealing with the land as such, who will find their titles invalidated and themselves liable in large sums as damages if contrary holding is now made.

The intent of Congress and the Creek Nation in the enactment of the treaty was the property, the disposition of which was provided in case of death, should pass to the heirs by the same right and in the same manner as if the person originally entitled to receive it had received the allotment, died possessed of it and transferred it to his heirs as a true inheritance.

The treaty did not create the right to share in the distribution of the tribal lands and other property. That right already existed, and the treaty was but a recognition of a preexisting right (Shulthis Case, *supra*) and prescribed the method of carrying that right into effect. Prior to its enactment, the right of the individual Indian, a citizen of the tribe, to occupy a portion of the tribal lands had been recognized and enforced as a property right (Shulthis Case, *supra*). Coupled with the right of occupancy was the right to improve the land occupied. Improvements on the land

included occupancy within the meaning of that term. Improvements, as thus defined, were subjects of inheritance and under certain conditions of barter and sale, though the occupier of the land had no legal title to it, and it was the intention of Congress and the Creeks that when an Indian died before receiving the land he was or would have been entitled to receive, the land should descend as though the Indian had received it and was vested with the legal title.

The central idea of the provision, as well as the use of the word "descend," was doubtless suggested to the framers of the treaty as creating a close analogy to existing conditions with which the Indians were familiar and understood, thus enabling the Indians to grasp and comprehend the import of the language used. In this situation—a situation in which the Indians were accustomed to see lands and property descend at death to heirs *in esse* without the deceased having any title to the land—the use of the word "descend" suggested a condition with which the Indians were thoroughly acquainted—the descent of the right of occupancy to land—and presented to their untutored minds the idea of the right to select an allotment or the right to an allotment descending, and not the idea such word would suggest to a mind trained in the intricacies of the law of real property.

It is, at least to us, impossible to conceive that the Indians formed any other idea or understood the treaty in any other sense than, if an Indian entitled to an allotment died without selecting it, the allotment and the right to select it descended to his heirs in existence at the time of death, and selection was a mere detail by which the right to an allotment was definitely affixed and stamped upon a particular tract of land. This provision of the treaty brought the picture to the mind of the Indians of the right of occupancy to land passing to heirs at the time of death without title to land, and, therefore, the understanding impressed on their minds was that right to land vested and descended without any legal title to it in the same manner and with like effect as if legal title in fact existed. Under these circumstances,

in their environment the word "descend" presented no solecism, no difficulty to be solved.

Understanding the treaty to this effect, by an unbroken line of decisions it should be so construed, we should, therefore, say that if at the time of Ellis Grayson's death he is to be treated as not having an estate of inheritance in the allotment to be afterwards selected, capable of being transmitted by inheritance, yet on that event "the lands went to his heirs *in esse* at the time of his death, as designated by and according to the laws of descent and distribution of the Creek Nation, precisely in the same manner as though he had died seized thereof," thus giving effect to the language of the treaty as to the intention of the parties to the treaty, thus in effect holding that the land was a grant, having attached thereto the qualities and incidents of a descent or an inheritance.

It may be urged that the case of McKee *vs.* Henry, 201 Federal, 74, is opposed to the views above presented, and if so, it is doubtless true that such case is opposed to some of the arguments herein advanced. It, however, fails to pass on some of the arguments here made and also advanced in such case, and does not take into consideration the fact that Indians acquire rights under the treaties before selection of land.

It is true that Congress in its dealing with dependent Indian nations may, at will, repeal any law or treaty regarding its control of Indians and regulating the affairs of Indian tribes. This power of repeal, however, does not take away any right created or recognized by the repealed law or abrogated treaty. On repeal, the right conferred by such law or treaty remains.

The idea here advanced is expressly recognized by this court in Choate *vs.* Trapp, 224 U. S., pages 665, 671, where the court says:

> "The tribes have been regarded as dependent nations, and treaties with them have been looked upon

not as contracts, but as public laws which could be abrogated at the will of the United States.

"This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the tribes. For, although the Atoka Agreement is in the form of a contract it is still an integral part of the Curtis act, and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law.

"Reichert *vs.* Felps, 6 Wall., 160.

"The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis act which are now protected by the Constitution of the United States.

"The individual Indian had no title or enforcible right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. For, the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement and to relinquish all of his right in the property formerly held in common.

In the Creek Nation, as in the Choctaw and Chickasaw Nations, the general scheme of the Government was to allot the lands in severalty; provide for the distribution of the funds of a tribe; to give Indians a limited control over the lands allotted; to provide for the issuance of patents and the surrender of all other rights in the tribal lands or funds other than those recognized by the treaty. So, for all practical purposes, the treaties are, in purpose and design at least, identical.

The right to an allotment is as much a right, capable of being recognized and should be recognized and enforced by law, as the right to have the allotment exempted from taxation.

The right of the heirs of Ellis Grayson to the allotment Ellis Grayson would have been entitled to, had he lived to receive it, was conferred by the original treaty, and became a property right acquired by the express terms of the treaty, and so, while the treaty might be repealed or amended, the right acquired under such treaty while in force could not be taken away and conferred upon another.

Patents for some of the lands involved in the Choate case, *supra*, had been issued at the time it was sought to subject them to taxation. But it does not appear to us that the issuance of the patent has any material bearing on the question, because the treaty is the inception of the right, the creative force that gives birth and life to the right, and the patent only furnishes the legal evidence of rights existing anterior to its issuance; and, as we are informed, an application for rehearing was filed by the representatives of the State of Oklahoma in the Choate case, expressly based on the ground that the point decided therein should be limited to lands which had been selected, or for which patents had been issued prior to the passage of the act of April 26, 1906. And that where lands had not been selected, or patents issued therefor, prior to May 27, 1908, Congress had the right to change, modify, or repeal the exemption against taxation under the conditions contained in the act. This doctrine

this court refused to countenance or recognize by overruling and denying the application for rehearing.

If Congress by the act of April 26, 1906, had no power to take away the right of an Indian to have lands to be thereafter selected by and allotted to him exempted from taxation, it is difficult to see how the right to receive, by inheritance or grant, an allotment conferred by the original treaty could be taken away, either by the act of May 27, 1902, or the Supplemental Agreement of June 30, 1902.

If the doctrine announced in the Choate case is proper to be applied here, it necessarily follows that the case of McKee *vs.* Henry is unsound.

II.

If the act of June 30, 1902 (32 Stat. L., 500), known as the Supplemental Creek Agreement, which was in force at the time of the selection of the land, determines the heirs, such Supplemental Agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the Supplemental Agreement; but such Supplemental Agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect.

If the act of June 30, 1902, known as the Supplemental Agreement, should be held to apply to descents already cast at the time of its enactment, it would be unconstitutional and void as beyond the power of Congress to enact; the act should, however, receive a construction which would make it act prospectively only, and thus render it inapplicable to all cases of descents already cast. Section six (6) of the act provides as follows:

> "The provisions of the act of Congress, approved March 1, 1901, in so far as they provide for descent

and distribution, according to the laws of the Creek Nation, are hereby repealed, and descent and distribution of land and money, provided for by said act, shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in the Indian Territory." z

This act, in our judgment, should be given the construction that the land and money of a citizen who had died after the passage of the act before receiving his allotment of lands and distributive share of the funds of the tribe should descend and vest in his heirs, as determined by the provisions of said chapter 49 of Mansfield's Digest. As thus construed, it would leave the inheritance from Ellis Grayson, or grant to his heirs, to be controlled by the provisions of the Original Agreement, providing that the distribution should be made to the heirs as determined by the laws of the Creek Nation. Such a construction is, in our judgment, necessary to relieve the act from being in contravention to the Constitution and to make it valid. Where this is necessary all legislative acts are construed to operate prospectively only, if they can be so construed without doing violence to the language of the law and the manifest intention of the law-making body.

It is a settled rule of statutory construction that an act will not be given a retrospective operation, unless the language of the act imperatively demands that such act be construed as applying to the past as well as to the future. The language of the Supplemental Treaty is not of this kind or character. It repeals the provisions of the act of March 1, 1901 (that is, the Original Agreement), in so far as they provide for descent and distribution according to the laws of the Creek Nation. If the act stopped here and made no further provisions, it would undoubtedly have left all vested or accrued rights unaffected, as it is well settled that the repealing of a law conferring a right does not take away that right, but only prevents the accrual of rights under such law after the passage of the repealing statute. But the act does continue and says:

> "The descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory."

This language is perhaps capable of a construction that all directions as to the descent and distribution of property made in the Original Creek Agreement are nullified, and none of such provisions should be valid; and, consequently, the provision that lands and money to which an enrolled citizen would be entitled shall be distributed to his heirs according to the laws of the Creek Nation, would be nullified under this provision. On the other hand, the language is fully capable of the construction that it was meant that after the repeal of the provisions as to descent and distribution contained in the Original Agreement and the passage of this new law, that lands which should be thereafter inherited or passed to the heirof allottees fordistribution, the allottee having died, should pass not according to the laws of the Creek Nation, but acording to chapter 49 of Mansfield's Digest. The Original Creek Agreement and the Supplemental Agreement each were dealing with two classes of inheritances: one, where the beneficiary died prior to the time either of the respective acts became operative; and the other, where the beneficiary died after the respective acts went into operation, but without receiving the allotment granted by the acts. And, of course, it may be assumed that the great majority of subjects on which the acts would operate would be where the beneficiaries died after the passage of the acts.

The object which Congress had in view was probably to render more certain the order of descent and to point out more particularly the grantees in the grants by adopting the law of Arkansas, as it must have known that the law of the Creek Nation was to a certain extent ill-defined and uncertain.

Now, if the language of the Supplemental Agreement is capable of a construction that it is to have a prospective operation and not a retroactive one, undoubtedly the pro-

spective construction should and will be given it. Especially is this so, as the Original Agreement created a right not theretofore existent, and operated as a grant to the heirs of such citizens of the Creek Nation as were living April 1, 1899, but who died before the act became effective—May 25, 1901.

All legislative acts will be construed to operate prospectively, unless a retrospective operation is imperatively called for by reason of the language of the act.

White *vs.* U. S., 101 U. S., 545.
U. S. *vs.* Peggy, 1 Cranch, 103.
City R. R. Co. *vs.* Citizens Railway Co., 166 U. S., 653.
Chew Heong *vs.* U. S., 112 U. S., 536.
Murray *vs.* Gibson, 151 Howard, 421.
Carroll *vs.* Carroll, 16 Howard, 275.
See also note 12, L. R. A., p. 50.

Believing that, under any view of the law applicable to the case at bar, we have demonstrated that the Supreme Court of Oklahoma was in error in holding that William Sizemore and Jeanetta Newberry were not entitled to an interest in the allotment granted to the heirs of Ellis Grayson by the Creek treaties, and such court should have held that William Sizemore and Jeanetta Newberry and Foil M. Brady were the heirs of Ellis Grayson, and each of said persons inherited, or had granted to them, the allotment Ellis Grayson would have been entitled to had he lived to receive the same in equal proportions, and this court will reverse and remand the cause with directions that judgment to such effect be entered, we close this brief.

All of which is respectfully submitted.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 59.

WILLIAM SIZEMORE and JEANETTA NEWBERRY, - - - - - *Plaintiffs in Error,*

vs.

FOIL M. BRADY, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

May It Please the Court:

The land involved in this case is the one-hundred-and-sixty-acre allotment that would have gone to Ellis Grayson, a Creek Indian, if he had lived until its selection and segregation as his allotment.

Statement of the Case.

Ellis Grayson, a duly enrolled member of the Creek Tribe of Indians, died on March 1, 1901. Though he would have been entitled, if living, to receive an allotment of 160 acres of Creek tribal land, no selection was made for him during his lifetime.

This selection was made however on August 23, 1902, sixteen months after his death, in the name of his heirs without naming them; the deeds or patents therefor under date of March 26, 1904, issued to his heirs, and this suit is brought to determine who these heirs were.

Ellis Grayson died at the age of nineteen, leaving him surviving neither child, wife, father, mother, brother nor sister, but he left him surviving as his nearest relations cousins on the sides both of his father and mother. The defendant in error is a cousin through the paternal side and the plaintiffs in error are cousins through the mother of Grayson.

Nearly three months after the death of Ellis Grayson there was put in force in the Creek Nation the Original Creek Agreement of March 1, 1901, chapter 676, 31 Statutes at Large 861, effective May 25, 1901. Section 28 provided for allotment to the heirs of certain Indians who had died or should die, the heirs to be determined by the laws of descent of the Creek Nation. These laws which had never operated on real estate, provided that descent

should be cast upon the nearest relations of the decedent, and under the Creek laws the mother and her heirs are nearer relations than the father and his heirs.

On June 30, 1902, the Creek Supplemental Agreement (effective July 26, 1902; chapter 1323, 32 Statutes at Large 500), repealed that provision of the Original Creek Agreement fixing descent according to the laws of the Creek Nation, and substituted therefor chapter 49 of Mansfield's Digest of the Laws of Arkansas, under which the father and his heirs would take the allotment of Ellis Grayson. It was under this law that the allotment was made to the heirs of Ellis Grayson.

The question then presented is: Do the relations on the side of the mother of Ellis Grayson (the plaintiffs in error) take as his heirs under the laws of descent of the Creek Nation, to the exclusion of the relation on the side of the father, or does the latter, the defendant in error, under the Arkansas rule of descent, take the inheritance from Ellis Grayson?

It is the contention of the defendant in error that it was not until the allotment was made that an estate came into being which could descend, and that therefore the law of descent in force at that time nominated the heirs to take the estate. It is under this view which is announced by the Supreme Court of Oklahoma, that Foil M. Brady, the defendant in error, is entitled to take the estate of Ellis

Grayson. The opposite view of the law contended for by the plaintiffs in error, denies this right to Brady.

Legislation Authorizing the Allotment.

The grant of the Creek domain by the United States to the tribe was made by authority of an Act of Congress of May 1, 1830, and of sections one to four of the Creek Treaty of February 14, 1833 (7 Stat. 417), and provided that the rights guaranteed under the grant should be continued so long as the Creek tribe should exist as a nation. Their title to this tract was evidenced by a patent issued and delivered by the United States conveying the same to them, bearing date August 11, 1852. The *habendum* clause of this patent is as follows:

> "To have and to hold the same unto the said Tribe of Indians, so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

The Dawes Commission was created and appointed under the authority of the Act of Congress of March 3, 1893 (27 Stat. L. 645). The Act of Congress of June 10, 1896 (29 Stat. L. 339), authorized and directed the Commission to hear applications of all persons who may apply for citizenship in the Five Civilized Tribes and make up a roll of citizens of each tribe, which were by the act

made the rolls of citizenship of the said tribes, subject to the determination of the United States Courts.

Congress by Act of June 7, 1897 (30 Stat. L. 83), authorized the Commission to continue the work of making up rolls of citizenship of the said tribes; afterwards was enacted the Act of Congress of June 28, 1898 (30 Stat. L. 495), known as the "Curtis Act," which gave the Commission greater authority and more specific directions in regard to the preparation of rolls of citizenship of the tribes. Section 21 of this Act among other things provides:

> "The rolls so made when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

Section 11 of the Curtis Act provided for allotting to the members of the tribes the use and occupancy of the surface of the lands of the tribes.

Though enrolled and living and entitled to allotment under this act, no allotment was made to Ellis Grayson under it. He died under this Act on March 1, 1901.

On March 1, 1901, there was approved by Congress the Original Creek Agreement (31 Stat. L. 861), which became effective on May 25, 1901, when

it was ratified by the Creek National Council. Part of said act reads as follows:

Section 3. "All lands of said tribe except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further dis-

tribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

Section 4. "Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and incompetents shall be citizens.

Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators, or suitable persons akin to them but it shall be the duty of said commission to see that such selections are made for the best interests of such parties."

Section 8. "The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23. * * * "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of

the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

The acceptance of deeds of minors and incompetents by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein."

Section 28 of this act reads as follows:

"*Rolls of Citizenship.* No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the People of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and

distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other person."

Ellis Grayson was dead when this Act became effective and no effort was made by his heirs to have an allotment made to them under the authority of section 28 of the Act. This Act provided that the heirs entitled to take the allotment when made in the right of Ellis Grayson were the heirs designated by the Creek law of descent.

Afterward and before an allotment for Ellis Grayson was made another Act of Congress intervened. The Creek Supplemental Agreement (32 Stat. L. 500) was approved by Congress June 30, 1902, and became effective when ratified by the Creek Tribal Council on July 26, 1902.

Section 6 of this Act reads as follows:

> "*Descent and Distribution.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Manfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: and, *provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

It was on August 23, 1902, while this last provision of the law was in effect, that the allotment was made to the heirs of Ellis Grayson of the lands in controversy. This law nominated as the heir a person different from the set of heirs who would have been nominated by the Original Creek Agreement.

ARGUMENT *and* AUTHORITIES.

I.

A duly enrolled citizen of the Creek Nation who died on March 1, 1901, without having selected an allotment of land, died seized and possessed of no interest either legal or equitable in the domain of the Creek Nation, and no persons claiming to be his heirs at any time after his death and before allotment had a vested right to land to be allotted in his name or right. They had a mere expectancy, subject to be changed or extinguished by subsequent Acts of Congress.

It is our contention that when Ellis Grayson died on March 1, 1901, and up to the time of allotment, the title to the lands in controversy and all other portions of the common domain of the Creek Nation was vested in the Creek Nation as a political society or corporate entity, with the contingent reversion in the United States as the dominant sovereign power.

The plaintiffs in error contend that before an allotment was made in the name of Ellis Grayson or his heirs, the title to the allotment to be made or the right to select an allotment in their names had vested in them. This contention is hypothecated on the proposition that section 28 of the Original Creek Agreement operated as a legislative grant to them.

As the issues in this case have been so well stated and so thoroughly elucidated in another case, a quotation from the opinion may well serve to present in concrete form our whole contention.

In *McKee* v. *Henry*, 201 Fed. Rep. 74, decided November 11, 1912, in all material respects the issues were identical with those in this case, previously decided by the Supreme Court of Oklahoma.

The suit was brought to determine whether the allotment made in the name of a Creek citizen after his death passed to heirs nominated by the laws of descent prescribed by the Original Creek Agreement, or by those subsequently prescribed by the Creek Supplemental Agreement, under which the allotment was made.

The Circuit Court of Appeals for the Eighth Circuit said in part:

> "It must be remembered that this land was in only partially organized territory of the United States at the time in question, and the Constitution provides:
>
> > 'The Congress shall have power to * * * make all needful rules and regulations respecting the territory * * * belonging to the United States.' Section 3, article 4, of United States Constitution.
>
> "That is to say, Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe of Indians were under the special guardianship of Congress, and it had plenary authority over

them. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed 299.

"It is not meant that Congress could defeat the Indian title which was held under patent from the United States, much less that a title once allotted could be disturbed. *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941. But it had full and ample authority to fix the laws of descent, with or without the consent of the Indians, both under its guardianship of the Indians, and their property, and under its power to make all needful rules and regulations respecting the territory belonging to the United States. It had this right to make laws by agreement with the Indians, but it beclouds the issue if it be assumed that such agreement was necessary when it was not. These lands belonged to the Indians as a tribe so long as the tribe existed and they occupied the land, with reversion to the United States; but no part of these lands belonged to any specific Indian. The Muskogee or Creek tribe was in the nature of a dependent nation; and as our national public buildings belong to the nation, the citizen, while he has an interest in them, has no share in the title to them, so these lands so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever, severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment then why was the

interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts* v. *Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. ed. 928, that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress.

"The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian.

> 'The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.' *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, 19 Sup. Ct. 722, 738 (43 L. ed. 1041).

"The title, so far as here pertinent, of the Creeks, was identical with the title of the Cherokees to their lands, and in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 120 (47 L. ed. 183), it is said:

> 'Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308 (6 Sup. Ct. 718, 29 L. ed. 880). The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 207 (15 Sup. Ct. 55, 60, 39 L. ed. 120), where this court referring to the treaties and the patent mentioned in

the bill of complaint herein, said: "Under these treaties and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them".'

"As already suggested if enrollment conferred a vested interest in any lands, why did it not confer a vested interest in any money or other property belonging to the tribe? Yet it has been held that the power of Congress to admit new persons to the rolls, thereby depleting the amount which would go to those previously on the rolls is political in its character, and not within the control of the courts. *Muskrat* v. *United States*, 219 U. S. 346, 31 Sup Ct 250, 55 L. ed. 246.

"In *Woodbury* v. *United States*, 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian long after his enrollment, but before allotment as a 'mere float—giving him no right to any specific property.'

"When the allotment was made for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided.

"In the conclusion that we have reached we find that we are in harmony with the Supreme Court of Oklahoma. *Brady* v. *Sizemore*, 124 Pac. 615; *Shellenbarger* v. *Fewel*, 124 Pac. 617.

"While our conclusion has been reached upon the authority of the Supreme Court of the United States, of this court, and what seems to us sound reason, it is gratifying to find that

there is uniformity in the decisions of the state courts and this court.

"At any time after enrollment, and before allotment, Congress could have repealed all legislation providing for allotment, and have restored the old system of tribal control; and, if this is true, manifestly no inheritable interest vested in any one until allotment."

That opinion leaves little to be said and certainly we can add nothing to the convincing logic that brought the Court to the same conclusion that was reached by the Supreme Court of Oklahoma in the case at bar. This decision was noticed briefly by plaintiffs in error, who say that the Court did not pass on some of the arguments presented in this case. It is likely that the Court did not discuss in detail all the subordinate propositions elaborated by them, but it cannot be denied that every proposition in their brief essential to a determination of this case was passed upon in that opinion.

II.

The mere right to allot land of the Creek Nation was not a vested right before it was exercised, because it was subject at any time to be withdrawn.

Counsel for plaintiffs in error say that the original Creek agreement was a legislative grant to the persons at that time standing in the relation of heirs of Ellis Grayson, who had previously died, of a vested right to the lands in controversy, which could not be disturbed by subsequent legislation. That the Act was a grant *in praesenti* to the plaintiffs in error.

That this contention is entirely fallacious we are confident. This Court, it seems to us, has settled the question. In a number of cases the Court was called upon to decide whether members of the Five Civilized Tribes by reason of legislation in their favor possessed vested rights in the lands of the tribes before allotment, and the Court has invariably held that they had not.

The language of section 28 of the Creek Agreement, relied upon by counsel, is:

> "and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, *and be allotted and distributed to them accordingly.*"

The argument of counsel proceeds upon the fallacy of giving effect to only part of the words used. They place stress upon the words "the lands * * * shall descend to his heirs," and consider the purpose of Congress accomplished, without reference to the last eight words, "and be allotted and distributed to them accordingly."

We maintain that the descent and allotment were simultaneous; that neither could be effected without the other; that the language of the whole paragraph must be given effect together, and it is just as essential to observe the direction of Congress that the "land be allotted" as it is that the "citizen has died or may hereafter die," before an estate is cast upon anyone under that section.

On page 15 of their brief they say, "The exact words of the statute are:

> "'If any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs'."

They close the quotation here and ignore the direction that the land be allotted.

"The lands and money to which he would be entitled, if living, shall descend, etc." What lands would Ellis Grayson have been entitled to, if living? To what lands were his heirs entitled? The answer was not known until August 23, 1902, when the land

in controversy was allotted. On that day, when this interest was identified and segregated, another law had intervened and said "the lands and money to which he (Ellis Grayson) would be entitled, if living, shall descend, etc.," and be allotted to the heirs *according to the Arkansas rule of descent.* It seems to us obvious that Congress meant that as to allotments made under the Original Agreement, they were to be controlled by the law then in force, and as to those allotments made under the Supplemental Agreement, they were to be controlled as to descent and all things else by the law then in force. Any other construction violates the obvious meaning of the words employed and imports difficulties that are entirely unnecessary to accomplish the object of the statute.

We confess to a failure to understand clearly from the brief of plaintiffs in error just how they take the right they claim. They state their contention variously, that the land descended, that the right of Ellis Grayson in the common property descended, and that they take by a legislative grant contained in section 28 of the Original Creek Agreement. It seems to us their argument involves a contradiction of terms; but, waiving the matter of defining the process by which they arrive at the result they seek, they are engaged in ascribing to Congress an intention not found in the letter of the Act nor

related to the object of the legislation in hand. Their argument, however, seems to be addressed mainly to the establishment of a legislative grant.

If section 28 was a grant, then it was a grant only of the interest that Ellis Grayson had, which was at most a mere expectancy, subject to be terminated by Congress at any time before allotment.

In the case of *Braun* v. *Bell*, 192 Fed. 427, the United States Circuit Court for the Eastern District of Oklahoma had under consideration the principles involved in this case. In that case a Creek citizen who was living on April 1, 1899, subsequently died and fell within the description of those who being dead were authorized to be enrolled and allotted by authority of section 28 of the Curtis Act, but he was not so enrolled and allotted until after the passage of the Supplemental Agreement.

It was urged there as in this case that the Original Creek Agreement amounted to a grant *in praesenti* to the living members of the tribe entitled to enrollment and to the heirs of such members as were living on April 1, 1899, and had since died, and that in cases such as this, where the member entitled to enrollment was dead at the time of the adoption of the Original Creek Agreement, an interest in the land vested at once by operation of the agreement in his heirs, according to the Creek law, of which neither Congress nor the tribe could divest them by subsequent legislation.

Upon authority of *Hayes* v. *Barringer*, 168 Fed. 221; *Wallace* v. *Adams*, 143 Fed. 716; *Woodbury* v. *United States*, 170 Fed. 302, and *Muskrat* v. *United States*, 44 Ct. Cl. 137, the Court overruled this contention and held that the estate passed to the heirs nominated by the law in force at the time of enrollment and allotment under the Creek Supplemental Agreement. Though that case is to be distinguished in the respect that the deceased citizen was not enrolled until after the Supplemental Agreement became effective, there is no difference in principle between that and this case.

That Ellis Grayson had no vested right in an allotment of land before his death and would have had none before his allotment if he had lived to receive one, we think is open to no doubt. It was within the power of Congress at any time to withdraw from Ellis Grayson completely if he were still living the right to an allotment of land before the land was actually allotted.

The case of *Gritts* v. *Fisher*, 224 U. S. 640, 56 L. ed. 928, cited in the *McKee* opinion, *supra*, involved the right of Congress to add minor Cherokee citizens to a roll previously compiled as a basis for allotting the lands of the tribe. It was opposed on the ground that it would disturb vested rights of Indians on the former roll, as it would diminish their pro rata share of lands. This Court said:

> "It is conceded, and properly so, that the later legislation is valid and controlling unless

it impairs or destroys rights which the Act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the Act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution. The difficulty with the appellant's contention is that it treats the Act of 1902 as a contract, when 'it is only an Act of Congress and can have no greater effect.' *Cherokee Intermarriage cases*, 203 U. S. 76, 93, 51 L. ed. 96, 103, 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Wallace* v. *Adams*, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363."

The same objection that arose in the *Gritts* case, *supra*, if well founded, would arise in the Creek Nation if the contention of the plaintiffs in error that section 28 of the Original Creek Agreement operated as a grant is correct. If it did so operate all Creek

citizens became vested with rights in all the land of the tribe as tenants in common; the extent of the interest granted them was measured by the number of persons authorized by the act to participate in the allotment of land of the tribe, and these interests could not be disturbed by subsequent legislation.

The last paragraph of section 28 of the Original Creek Agreement reads:

> "The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, *upon which the allotment of all lands* and the distribution of all moneys and other property of the tribe shall be made *and to no other persons.*"

Subsequently there was enacted the Supplemental Agreement, Act of Congress of June 30, 1902 (32 Stat. L. 500). Sections 7 and 8 of this act provided for adding to the rolls of the Creek Nation the names of persons not provided for in the original agreement and for making allotments to them also. Thereby the basis for allotment upon which plaintiffs in error and all other citizens of the Creek Tribe took their grants under the act was destroyed and a new one substituted which diminished the individual interests or pro rata shares claimed by them as vested rights.

On March 3, 1905, Congress passed another Act (33 Stat. L. 1060), providing for the enrollment of still another class of children in the Creek Nation

(as well as in the Seminole, Choctaw and Chickasaw Nations), by which thousands of children were authorized to participate in the allotment in addition to those provided for on former rolls which were declared to establish the basis upon which allotments were to be made.

Afterward another Act (34 Stat. L. 137), approved April 26, 1906, provided in section 2 for the addition of still another class of citizens to share in the partition of the lands of the Choctaw, Chickasaw, Cherokee and Creek lands.

Though these later provisions of law diminished the pro rata share of persons found on former rolls it has never been held that Congress violated any vested rights of those persons. In the case of *David Muskrat* v. *The United States*, reported in 44 Court of Claims Reports, page 137, the statute last above mentioned was unsuccessfully assailed on the ground that it disturbed vested rights. It has been repeatedly held that this action of Congress "was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued."

—*Gritts v. Fisher*, 224 U. S. 640;
Stephens v. *Cherokee Nation*, 174 U. S. 445;
Cherokee Nation v. *Hitchcock*, 187 U. S. 294.

In *Hayes* v. *Barringer*, 168 Fed. Rep. 221, the Circuit Court of Appeals for the Eighth Circuit said that "while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribe, *they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or the Indian Nations.*"

Again, in *Wallace* v. *Adams*, 143 Fed. Rep. 716, it is clearly and unequivocally held that a duly enrolled citizen under a decree of the court provided for by law from which there was no appeal, had no property interest in or legal or equitable title prior to selection of allotment. The Circuit Court of Appeals for the Eighth Circuit said:

> "When it was passed the Dawes Commission, to whom Congress had delegated the power to distribute the lands of the tribes, had not allotted the land in dispute to the defendant. *He had, therefore, acquired no vested right in it as against subsequent legislation of the United States* because, *until such allotment was made*, all the proceedings determinative of citizenship and of distribution, which derived their force and effect from the legislative power of the United States alone, were necessarily subject to further exercise of that authority."

The Court said further:

> "But none of the authorities cited contains a decision that one has a vested right in a judgment of citizenship which the legislative de-

partment of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property."

In reaching its conclusion the Court states by way of analogy:

> "Nothing short of entry and payment confer upon a settler vested rights against the United States which impair in any respect the plenary power of its legislative department to dispose of the land to another or to withdraw it from sale for the use of the government."

The Court then cites a large number of cases as authority for the proposition stated, and especially mentions and analyzes the case of *Emblen* v. *Lincoln Land Co.*, 42 C. C. A. 499, 102 Fed. 559. Though rights of the contestant in that case came much nearer establishing vested rights in him than the plaintiffs in error here have shown, they availed him nothing against the power of Congress to take them away.

In the case of *Woodbury* v. *United States*, 170 Fed. Rep. 302, the Circuit Court of Appeals for the Eighth Circuit said:

> "Counsel for complainant further contends that as Woodbury at the time of his death was a member of the tribe, and possessed of all the qualifications entitling him to an additional allotment, and as the only reason why his right had not ripened into an actual allotment was the preliminary administrative work necessary

to carry out the project, this, being no fault of his, ought not to impair his right. The difficulty with this argument is that the delay was nobody's fault. It must have been contemplated by Congress. *Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right.*"

This question has been fully discussed by the Court of Claims in the case of *David Muskrat* v. *The United States*, 44 Court of Claims Reports 137, and by this court, 219 U. S. 347, 55 L. ed. 246. That case involved the power of Congress to provide in the Act, approved April 26, 1906, for the enrollment of additional persons on the rolls of citizenship of the Cherokee Nation, and giving them allotments in the Cherokee Nation. The only agreement with the Cherokees was approved July 1, 1902, and ratified by the Cherokee Nation at an election held August 7, 1902.

Without the consent of the tribe, Congress, in the exercise of its plenary powers, enacted the provisions of the Act of April 26, 1906, providing for an additional enrollment in the Cherokee Nation. The constitutionality of that act was assailed upon the ground that the enrollment and allotment of additional citizens would result in reducing the *pro rata* share of each allottee under the agreement and would thereby destroy vested property rights.

The Court held there that the power of Congress to admit new persons to the rolls, thereby reducing the amount which would go to persons previously on the rolls, is political in its character, and not within the control of the courts. The Court of Claims said in that case:

> "Nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States."

Analogy Under Preemption Laws.

The analogy previously mentioned may be pursued further in the opinion of this Court in the case of *Hutchings* v. *Low*, "*The Yosemite case*," 15 Wall. 77, 21 L. ed. 82, wherein it was said, quoting *Frisbie* v. *Whitney*, 9 Wall. 187:

> "Under the preemption laws, mere occupation and improvement of any portion of the public lands of the United States with a view to its preemption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the

first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived."

This doctrine is announced in the following cases:

Frisbie v. *Whitney*, 9 Wall. 187, 19 L. ed. 668;

Campbell v. *Wade*, 132 U. S. 34, 33 L. ed. 240;

Northern Pacific R. R. Co. v. *Smith*, 171 U. S. 260, 43 L. ed. 157;

Buxton v. *Traver*, 130 U. S. 232, 32 L. ed. 920;

Northern Pacific R. R. Co. v. *Colburn*, 164 U. S. 383, 41 L. ed. 479;

Russian American Packing Co. v. *United States*, 199 U. S. 570, 50 L. ed. 314;

King v. *Andrews*, 111 Fed. 860;

U. S. v. *Holmes*, 105 Fed. 41;

Wagstaff v. *Collins*, 97 Fed. 3;

Norton v. *Evans*, 82 Fed. 804;

McCune v. *Essig*, 122 Fed. 588.

It must be apparent that section 28 of the Original Creek Agreement created no greater estate for the heirs so called, than Ellis Grayson would have had if he had survived, and whatever they took under the Act was a mere expectancy, a legislative, executive gift, subject to be terminated at any time before a right matured under it by allotment.

Though it lacked the essentials of an executory gift, even if it rose to that description, it could not be called a vested right until the right was asserted, for whatever it was, it could be withdrawn at any time before the right was exercised.

Judge Cooley, in his work on Constitutional Law, 7th ed., page 512, in discussing the law of descent and distribution, says:

> "And it is because a mere expectancy of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property, than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession,— a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared.

He says further:

> "It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws."

Quoting from the leading case of *Merrill* v. *Sherburne*, 1 N. H. 199, 213, 8 Am. Dec. 52, Mr. Cooley says that acts of the legislature cannot be regarded as opposed to fundamental axioms of legislation:

"Unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. *The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee.*"

Vol. 8 of Cyc, page 894, defines a vested right as follows:

"Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

And to the same effect is *Richardson* v. *Akin*, 87 Ill. 138.

III.

The lands of the Creek Nation before allotment were held by the Tribe for the common use of the members, and no right in severalty could be asserted by any member.

In *Cherokee Nation* v. *Hitchcock*, 187 U. S. 292-308, 47 L. ed. 183, the Court said:

> "Whatever title the Indians have is in the Tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.
>
> "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the Act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127,146, 48 L. ed. 646, this Court said:

> "The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. *Stephens* v. *Cherokee Nation*, 174 U. S. 445-488, 43 L. ed. 1041-1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 47 L. ed. 184, 23 Sup. Ct. Rep. 115. Under the patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a Nation, and no title vested in severalty in any of the Cherokees."

See also, *Cherokee Nation* v. *Journeycake*, 155 U. S. 196-207, 39 L. ed. 120-124.

In *Eastern Band of Cherokee Indians* v. *United States and Cherokee Nation*, 117 U. S. 288-312, 29 L. ed. 881-887, the Court said:

> "The lands from the sales of which the proceeds were derived, belonged to the Cherokee Nation as a political body and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common *that he could claim a pro rata proportion of sales made of any part of them*. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our government by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members"

In *Ligon et al.* v. *Johnston et al.*, 164 Fed. 670, the United States Circuit Court of Appeals for the Eighth Circuit had under consideration the precise point involved in this discussion, that is, did a citizen have any vested right in the common property of the Tribe?

The Court said:

"That the lands involved were public lands belonging to the Choctaw and Chickasaw Nations and not to the individual members has been assumed without contradiction from the inception of their titles through a long sequence of Acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is so only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people. *Until specific, private, individual rights attach pursuant to law, the inforcement of such trusts must be at the bar of public conscience. They are not justicable in the courts. The disposition of the tribal property of the Indian tribes falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts.*

"In *Stephens* v. *Cherokee Nation*, 174 U. S. 488, 43 L. ed. 1041, it was said that the lands and moneys of the Indian Nations then before the court were public lands and moneys, and the Acts of Congress relating to the determination of citizenship could not be successfully assailed on the ground of the impairment or destruction of vested rights; and the Court was then speaking of title of the Choctaws and Chickasaws, as well as that of the Cherokees. Whether complainants should be enrolled as citizens of the Indian Nations is a *political or administrative question, and none the less so because upon its determination depends the measure of their participation in the tribal property.*"

In the case of *Stephens* v. *Cherokee Nation*, 174 U. S. 488, it was claimed that an Act of Congress extending the remedy of appeal from judgments of citizenship in the tribes was unconstitutional because destructive of property rights. This Court said in part:

> "But in any aspect, we are of the opinion that the constitutionality of these acts in respect to the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. *The lands and moneys of these tribes are public lands and public moneys*, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry as to his status involves a contradiction in terms."

In the case of *Hayes* v. *Barringer*, 168 Fed. 221, the Circuit Court of Appeals for the Eighth Circuit said:

> "At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of these lands which they could matintain against the legislation of the United States or of the Indian Nations."

IV.

Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe were under the special guardianship of Congress and it had plenary authority over them.

—*McKee* v. *Henry*, 201 Fed. 74;
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299.

In the case of *Lone Wolf* v. *Hitchcock* it was said by this Court:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

In the case of *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, it was said:

> "The power of the general government over these remanants of a race once powerful now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government because it has never existed anywhere else"

In *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738, this Court said:

> "That Congress has full power to legislate concerning the tribal property of these Indians has been frequently affirmed."

In *Choctaw Nation* v. *United States,* 119 U. S. 1-27, 30 L. ed. 306, it was said:

> "Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands are concerned, to be controlled by direct legislation of Congress."

V.

The selection or allotment of the land was the initiatory step and was prerequisite to the vesting of any individual title or interest in the land of the Tribe.

Sections 3, 4, 5, 7, 8 and 37 of the Original Creek Agreement expressly refer to the selection of allotments.

Section 37 provides that:

> "Creek citizens may rent their allotments, when selected, etc."

Likewise the Supplemental Agreement provides for the selection of allotment, and in section 5, expressly mentions the certificate of selection of allotment. The Supreme Court of Oklahoma in construing the Creek Agreement held in the *deGraffenreid* case, 95 Pac. 624, that the equitable title dated from the selection of the allotment. If the Creek citizen obained a grant *in praesenti* of an undivided in-

terest in the domain of the Creek Nation immediately upon the ratification of the Original Agreement, then such Creek citizen could sell and alienate his undivided interest for the reason that there is no provision in the treaty restraining alienation prior to allotment.

Section 7 of the Original Creek Agreement (31 Stat. L. 861) provides that:

> "Lands allotted to citizens hereunder shall not in any manner whatsoever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, etc."

Section 16 of the Supplemental Agreement (32 Stat. L. 500) provides:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years, etc."

The courts have consistently and repeatedly held in many cases arising in the Five Civilized Tribes that individual title to real estate dates from the selection of the allotment. It was stated in *Hooks* v. *Kennard*, 28 Okla. 457, 114 Pac. 744, that:

> "This court has held in several cases that the selection of and the filing upon an allotment of land was the *inception and beginning* of the title of the allottee or his heirs, and that, when

the patent which is only the evidence of title is issued, it relates back to the inception of the title."

The Supreme Court of Oklahoma has adhered to that doctrine in the following cases:

deGraffenreid v. *Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624;

Godfrey v *Iowa Land & T. Co.*, 21 Okla. 293, 95 Pac. 792;

Irving v. *Diamond*, 23 Okla. 325, 100 Pac. 557;

Sanders v. *Sanders*, 28 Okla. 59, 117 Pac. 338;

Divine v. *Harmon*, 30 Okla. 820;

Shellenbarger v. *Fewell*, 124 Pac. 617;

Morley v. *Fewell*, 32 Okla. 452;

Ground v. *Dingman*, 127 Pac. 1078;

Scott v. *Jacobs*, 140 Pac. 148.

This proposition was maintained also by the Circuit Court of Appeals for the Eighth Circuit in *McKee* v. *Henry (supra)*, 201 Fed. 74, and in *Hayes* v. *Barringer*, 168 Fed. 221 *(supra)*.

This rule is laid down also in the case of *Muskrat* v. *United States*, 44 Court of Claims Reports 137, 219.

The United States Circuit Court for the Eastern District of Oklahoma held the same in the case of *Braun* v. *Bell*, 192 Fed. 427.

VI.

The purpose of section 28 of the Original Creek Agreement was to establish a basis for the allotment of the lands of the tribe. A legislative grant to any member or the vesting of rights by any method other than by allotment is foreign to the general purpose of the act and is not expressed nor intended.

Plaintiffs in error quote only that part of section 28 referring to enrollment of deceased members and the allotment and descent of their interests. There are four paragraphs in this section quoted in full on pages 8 and 9 of this brief that they may be considered together. Within that section is gathered all the law establishing a basis for allotment.

This section is entitled "Rolls of Citizenship." It provides when the rolls shall be closed. What deceased citizens shall be placed on the rolls. How their inchoate interests in the tribal lands, if they die before allotment, shall be preserved and ultimately ripen in allotment. For the enrollment of minors, and, in the event of their death, for allotment and descent of their interests. And finally, "*The Rolls so made* by said Commission when approved by the Secretary of the Intrior, *shall be the final rolls* of citizenship of said tribe, *upon which the allotment of all lands* and the distribution of all moneys, and other property of the tribe shall be made, and to no other person."

These provisions form a basis for alloting the property of the Creek Nation. They are all parts of the general scheme for accomplishing the partition of the tribal estate. The descent of the interest of the dead citizen in the communal property before allotment is not related to this legislation. It is immaterial to the subject in hand where this expectancy is before the estate is created. But it was important to know that at the instant the land was allotted there should be heirs to receive it, that the allotment should be accomplished, and it was necessary therefore to identify those heirs by law.

But it was not necessary, nor expedient nor in any way related to the undertakng in hand that the act should operate as a legislative grant to any person.

In this act Congress was concerned with a rule of descent only incidentally to the main undertaking and not at all with vesting rights, except in the execution of the general plan of allotment which operated alike on all lands. This, like every other statute, must be construed with reference to the object to be accomplished by it. The claim that Congress intended to enact an innovation in the law by changing a mere right of expectancy before allotment, to a vested right, where the reason and purpose are lacking, does violence to the well defined object of Congress in the premises. It is a departure from the rule by which statutes are to be construed, and we think cannot receive the sanction of this court.

It is urged by plaintiffs in error that the members of the Creek Nation had in mind their theory and intended section 28 of the Creek Agreement to have the effect of vesting rights to land in heirs of deceased Indians before allotment was made. That is an assumption not supported by proof or the language of the act. And if their theory is legally impossible, as we think we have demonstrated, an argument based on it cannot advance their cause.

But if it be urged that the court is to be required by an inference of what was in the minds of the members of the tribe, to place upon the act a construction that has no authority in law, observe the mandatory direction *expressed* by the same Original Agreement that the lands of the Creek Nation were to be allotted to the persons on the roll provided for by said act "and to no other person." Surely we are warned that that was in the minds of Congress and the tribe and yet in three subsequent acts that roll was enlarged and many persons added, to share in the lands and the money of the tribe.

In spite of the fact that the will of the makers of a similar agreement in the Cherokee Nation was disregarded, this Court held in *Gritts* v. *Fisher*, *supra*, 224 U. S. 640, that Congress could not be prevented from changing the law, so as to add other persons to the roll. Congress there without the consent of the tribe varied the terms of an act and invaded what plaintiffs in error would call a vested right. In the instant case the Creek Nation by its

participation and assent is a party to the Supplemental Agreement varying the provision of the former agreement which is here under consideration.

This question of the power of Congress to legislate concerning the Indians was covered by this Court in *Gritts* v. *Fisher, supra,* where it was held that it is after all a matter of governmental policy, and Congress may make or repeal any laws relating to the Indian's land before the land is allotted to the individuals.

VII.

If Ellis Grayson had no vested right in this land before allotment, no greater estate vested in his heirs.

It must be apparent that Ellis Grayson, if he had survived the Original Creek Agreement, would have had no vested right in an allotment of land until the allotment was selected by him. But notwithstanding, the plaintiffs in error are claiming that they took a larger estate than the author of that estate had. That by some process when the estate came to them they not only took the right to allot the land he would have been entitled to if he had exercised his right to allot it, but they took it clothed in exemptions which never would have attached to it if he had lived. A mere float, a mere

expectancy in his hands, inchoate and without substance or value until the right of allotment was exercised, came to them fully matured, enlarged and fortified against the power of Congress to distrub. They took this right they say on May 27, 1901, but never exercised it. But notwithstanding, it was vested in them, they claim, before and regardless of whether in law it was invested with the form of allotment.

Though Ellis Grayson could claim no vested right before allotment, they say they are exempt from that limitation. If they are correct we would find Congress bestowing a bounty upon them in addition to their inheritance. *Any right, interest or exemption they claim in excess of that which Ellis Grayson could have claimed before allotment, if he had lived, is not based on reason or logic, and it will not be assumed that Congress intended such an anomaly.*

The estate of Ellis Grayson is not complaining that the law has not been executed exactly according to the rights secured to it by the Original Creek Agreement. It is not contended that the change in the law varied in the slightest degree his rights as a Creek citizen. The allotment was made though he did not survive to receive it and it descended as it would if he had died after allotment. The inchoate right of the living Ellis Grayson became concrete and vested ultimately upon allotment. He

does not claim, nor any one for him that vested rights have been destroyed. That contention is made by persons, not for him, but for themselves, claiming that their rights have been invaded. That by inclusion of one law of Congress they were named as the heirs and that they in their personal capacities and not as representing Ellis Grayson have been deprived of that right by another law of Congress.

If, on June 30, 1902, instead of changing the rule of descent prescribed in section 28 of the Original Agreement, Congress had passed a law, the effect of which would have been to strike Ellis Grayson's name from the roll and take away from his heirs the right to an allotment in his name, they could not complain that a vested right was being disturbed. Upon the authority of this court, there can be no question of the power of Congress to do this. Then of course there was no vested right of allotment in the heirs of Ellis Grayson, much less was there a vested right in a particular rule of descent in favor of certain alleged heirs.

If Congress and the tribe could enact a law subsequently to the death of Ellis Grayson, providing for the allotment of lands of the tribe among its members, and had the power also to provide that the name of any deceased citizen should be enrolled and allotment made in his name, they had equal authority to say who would be the person to whose use and benefit such allotment should inure.

Congress and the tribe had plenary power and absolute and unconditional authority.

The title was in the Creek Nation as a political society with a contingent remainder in the United States. To whom the land should be allotted rested entirely with these two sovereign powers.

VIII.

Application of Section Six of the Creek Supplemental Agreement (32 Stat. L. 500), changing the rule of descent of lands allotted after the Act, in the right of citizens dying before the Act, is not to be denied on the ground that it would operate retrospectively. In view of the purpose to be accomplished and the state of the subject matter, the operation was not retrospective. The power reposed in Congress and the legislation discloses the intention, to make all lands allotted to heirs after the date of the Act, descend according to the rule of descent in force at the date of the allotment, regardless of what rule of descent was in force before the Act.

Plaintiffs in error say that if it be held that the Supplemental Agreement operates on descents already cast, it would be unconstitutional. That it should operate only prospectively. We are aware

of the rule that statutes cannot be made to operate retroactively so as to disturb vested rights, but that situation does not exist here.

Section 6 of the Supplemental Agreement reads as follows:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: and, *provided further*, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

A degree of confusion is involved by the use of the words "retrospective" and "prospective" as applied to the effect to be given this section. If it be assumed that a right to appear as heirs and apply for the allotment of Ellis Grayson was granted the plaintiffs in error by the Original Agreement, the Supplemental Agreement did act retrospectively and take away that right, as was entirely within the power of Congress.

But if no right had vested, the Supplemental Agreement operated on the parties and the subject matter without limitation, whether it be called retrospectively or prospectively. The interest in "the lands to which he (Ellis Grayson) would have been entitled if living" not having been "allotted and distributed" to any one, had not descended and therefore was subject to such legislation as Congress saw fit to enact.

Congress was legislating with reference to a continuing situation and as the interest in controversy had not been impressed by any rule of descent no rights had vested and the act was not retrospective in the sense in which counsel use it.

The case of *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 43 L. ed. 1041, involved the question of the validity of an Act of Congress giving the right of appeal from judgments of citizenship in the tribes theretofore rendered. It was claimed that because the act was retrospective it was invalid as destructive of vested rights—the rights of citizenship. This Court said as to that:

> "And the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of the lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

It seems to us that this whole controversy was epitomized by this court in the case of *Gritts* v. *Fisher*, 224 U. S. 640, when it said:

> "It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress, at any time before it was carried into effect and while the tribal relations continued."

The plenary authority of Congress over the Indians is clearly shown in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299.

The Purpose of Section 28 of the Original Creek Agreement.

If what Congress meant was that the Supplemental Agreement should furnish a rule of descent only in cases where the citizen had died after that act "before receiving his allotment of lands and distributive share of all the funds of the tribe," as counsel say should be the construction of the act, this section would have been framed in entirely different language.

Both acts under discussion were part of the plan for accomplishing the partition of the lands of the Creek Nation among the members of the tribe. The Original Creek Agreement made provision for allotment and every contingency was provided for. Provision was made for allotting to adults, to mi-

nors, to prisoners, convicts and to infirm so that no person would be overlooked. Provision had previously been made (page 4 of brief) culminating in the Curtis Act of June 28, 1898 (30 Stat. 495), for the enrollment of living members of the tribe. It was evidently conceived that persons entitled to enrollment might have died after the last legislation on the subject, the Curtis Act, without having exercised that right, or that, surviving the Original Agreement, might die without having exercised the right to take an allotment.

Congress accordingly provided in section 28 of the Original Creek Agreement that such person entitled to be enrolled who had survived the Curtis Act about nine months, that is until April 1, 1899, and had since died without being enrolled, should be enrolled and an allotment made in his right, and if enrolled he should die without an allotment, said allotment should still be made, so that the fact of his death would not prevent the allotment being made that would have been made if he had lived. This section closed the rolls completely as to all persons on the date of its ratification May 25, 1901.

In other words the number of Creek Indians living on April 1, 1899, entitled to allotment (and children born of them up to July 1, 1900), was established as the basis for the allotment of the lands of the tribe. In order that this measure of allotment should be preserved, it was provided that the inchoate right or expectancy of allotment should

continue in the name of all classes until it ripened into an allotment, regardless of any inquiry as to whether they were living or dead. And that when enrollment and allotment were made for dead citizens, the same rights—no more and no less—would vest that would have vested in the lifetime, the only difference being that they would vest in the heirs.

ALLOTMENT WAS NECESSARY TO SEGREGATE AND VEST A MEMBER'S INTEREST IN LANDS OF THE TRIBE.

The next step in the undertaking was to provide when the allotment was made for the vesting of title in living persons as heirs, so that the allotment would be complete.

Congress was engaged in a general scheme for the partition of the tribal estate among the members of the tribe. A conveyance of 160 acres of land to a member of the tribe vested title in him, but in the absence of an agreement to that effect would not bind him to waive his right to an interest in the remainder of the common property of the tribe; in fact, without authority of the law he could not waive it. The partition of the tribal estate as to any member was not complete until he had received his share and relinquished all claims to the remainder of the tribal property. Congress accordingly had provided in section 23 of the Original Creek Agreement that:

"Any allottee accepting such deed shall be deemed to assent to the allotment and convey-

> ance of all the lands of the tribe as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.
>
> "The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein."

The allotment of tribal lands involved some of the features of a contract. There was a granting party on the one hand and a party on the other hand to accept the grant, capable of agreeing to the terms under which the grant was made. Doubtless the assent to these conditions when the deeds were delivered related back to the allotment and was presumed when the selection was made. But there was no relinquishment of the tribal property nor assent to the allotment of the lands by the individual before his allotment or selection was actually made. This consideration made the agreement to allot a mere executory contract under which no rights vested at all until completed by both parties by allotment.

Allotment embraced the idea of something done by both parties. Citizens were required to select their allotments. That prerequisite is apparent in sections 3, 4, 5, 7, 8 and 23 of the Creek agreement quoted by us (pages 6-7) and it was held in the cases cited by us (pages 38-39) that this selection is

the inception of the title. The agreement to allot the lands did not execute itself. It could not be executed except by the beneficiary signifying to the grantor an acceptance of the terms by selecting his share of the lands. The minds of both parties then must meet and the executory agreement became executed so far as could be before the patents were delivered and accepted.

Provisions similar to those of section 23 of the Creek agreement just quoted, by which the allottee agrees to the terms of the allotment, are found in the legislation relating to the allotment of the Choctaw and Chickasaw lands. They are found in the section entitled "Members' titles to lands," of the agreement with the Choctaw-Chickasaw Indians of April 23, 1897, The Atoka Agreement (30 Stat. L. 514), incorporated in the Act of June 28, 1898, and in section 65 of the Choctaw-Chickasaw Agreement of July 1, 1902 (32 Stat. L. 641).

This Court in the case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941, said of these provisions:

> The Atoka Agreement. 'That each enrolled member of the Tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.
>
> "Upon delivery of the patent the agreement was executed, and the Indian was thereby

> vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller* v. *Ashford*, 133 U. S. 621, 33 L. ed. 672, 10 Sup. Ct. Rep. 494; *Hendrick* v. *Lindsay*, 93 U. S. 143, 23 L. ed. 855."

These provisions had a place in the scheme of allotment and establish clearly that reciprocal undertakings were necessary to segregate the interest of any member from the common property of the tribe.

Of course this assent could not arise out of an allotment to a dead Indian any more than to a fictitious person, and this Court said in the case of *Moffatt* v. *United States*, 112 U. S. 24, that:

> "A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the land to no one."

It was necessary therefor to provide by law for persons to stand in a representative capacity to the dead citizen to make the relinquishment for him or in his name. Even if they took by purchase, they took by right of representation of the expectancy which was in Ellis Grayson.

If, in legal effect, Congress had plaintiffs in error in mind when provision was made in the Original Agreement for descent and distribution of Ellis Grayson's interest to his heirs, the greatest extent of the undertaking was that if an allotment of that

interest were made under that law, the vesting of title in plaintiffs in error under the terms of allotment, would satisfy Congress of the relinquishment in his behalf and would thereby complete the allotment. In its widest scope it was only an executory contract. It was never executed under the law that would have benefited the plaintiffs in error.

The complete severance of a deceased member's interest from the common property of the tribe so as to operate as a relinquishment of all claim in his behalf to such common property could only be accomplished by an allotment to persons capable of being definitely identified by law as his heirs, who were competent to be bound in this representative capacity, to the same extent that the citizen himself would have been bound had he lived and received his allotment.

These considerations we believe made it necessary for Congress to provide a means for identifying the heirs in case of allotment. Congress accordingly provided by the Original Creek Agreement that the Creek law of descent and distribution should identify the heirs to whom the land should be allotted and should descend, and who were thereby qualified to and did by receiving the allotment give an acquitance to the United States and to the Creek Nation on account of the claim that survived in the name of the dead Indian to a share of the common property of the Nation.

THE REASON FOR THE AMENDMENT FOUND IN SECTION 6 OF THE SUPPLEMENTAL AGREEMENT.

Soon after, it was realized that this provision was unsatisfactory, and that the former considerations, as well as that of public policy required the substitution of a written and well defined law of descent and distribution. The Creeks never had a law of descent and distribution that operated on land, and what their law was, was uncertain and vague and to some extent was a matter of oral proof as to Creek customs.

Within a very short time after the Original Agreement became effective the mistake was recognized. At the first session of Congress after the adoption of the Original Creek Agreement, in part of section 1 of the Indian Appropriation Act of May 27, 1902, chapter 888 (32 Stat. 258), the rule of descent was changed. This provision reads as follows:

> "That the Act entitled 'An Act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes,' approved March first, nineteen hundred and one, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory."

This change in the law was then incorporated in the Creek Supplemental Agreement of June 30, 1902, previously quoted, to which the Creek Nation became a party. This repealed the provision of the Original Creek Agreement establishing the Creek law of descent and substituted therefor chapter forty-nine of Mansfield's Digest of the Laws of Arkansas.

After the ratification of the Supplemental Agreement, the Original Agreement was to be read from then on as if it had been originally drafted with the Arkansas law of descent and distribution incorporated therein in lieu of the Creek law of descent and distribution, and that non-citizens shall not inherit lands of the Creek Nation. The second paragraph of section 28 of the Original Agreement therefore, immediately upon the ratification of the Supplemental Agreement, stood as follows:

> "All citizens who were living on the first day of April, 1899, entitled to be enrolled under section 21 of the Act of Congress approved June 28, 1898, entitled 'An Act for the Protection of the People of the Indian Territory and for Other Purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution (not of

the Creek Nation) set forth in chapter 49 of Mansfield's Digest of the Laws of Arkansas, and be allotted and distributed to them accordingly: *Provided*, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation, etc."

In the next paragraph of section 28 the same substitution of the Arkansas law was made, and it should be read and interpreted accordingly.

Under section 6 of the Supplemental Agreement, the power and jurisdiction of the Commission to set apart an allotment to the heirs identified by the Creek Law of Descent and Distribution was repealed and revoked. Congress and the tribe had this authority, and they clearly expressed it in substituting the Arkansas law of descent for the Creek law of descent.

If this result is accomplished by a retroactive effect of the law, then we say that that is exactly what Congress intended. It seems to us that in view of the power of Congress in the premises, we are less concerned with defining the effect as retroactive or prospective, than we are with ascertaining the purpose of Congress and the object to be attained.

It is to be assumed that Congress had a reason for changing the law of descent and we think we have shown what that reason was. The object would have been only partly attained if, as plaintiffs in

error say, the change should be limited to cases where the citizen died after the Supplemental Agreement became effective. The necessity as well as the authority for a change in the law touched all cases where allotment was not made whether the citizen died before or after the Supplemental Agreement; and the intention of Congress to make the statute so operate is found in the language employed and in the object to be accomplished.

The result of this legislation it seems to us was just this: If the allotment had been made under the Original Agreement it would have descended to the heirs then living and identified by that law. As the allotment was not made under that law, but was made under the Supplemental Agreement it descended to the heirs then living and identified by that law.

These considerations lead us to agree in a measure with counsel for plaintiffs in error on one proposition. We refer to it here because it seems to us that their illustration supports the theory we contend for: that the allotment and descent are effected simultaneously and necessarily therefore to the heirs identified by the law of descent at the time of allotment.

On page 24 of their brief counsel discuss the holding of the Supreme Court of Oklahoma in similar cases, that though the descent is cast on the

date of allotment, by a legal fiction the dead member of the tribe will be treated as having lived to receive the allotment. That though the land descends under the law in force at the date of the allotment it vests in the heirs (or their heirs) who were living on the date of the death. This method of identifying the heirs is not necessary to the rule announced in this case. We agree that it is incongruous and illogical, but we think it must be apparent that that holding in no way affects the conclusion reached in the instant case.

Counsel reach their conclusion upon principle which it seems to us is illustrated by the Supreme Court of Kansas in the case of *John Brown and Jane Brown* v. *Adel Belmarde*, 3 Kan. 35, which is authority for the contention we make here. In that case the Indian Lavonture died in 1847 or 1848. In 1860 a grant of his interest in the reservation was made by the government to his heirs. It was held by the court that the title vested in the persons who would have been the heirs of the deceased Indian had he died on May 26, 1860, the date of the grant, and not those who would have taken if the title had vested at the time he died. The descent was effected at the time of the grant which created the estate.

In that case the Act of Congress of May 26, 1860, was the grant to the individuals and left nothing to be done except to identify the heirs. There was no question as to the date when the title vested

and it was held that the vesting of the title and the descent to the heirs, which were synonymous with the identification of the heirs, were simultaneous. The court said:

> "His (Lavonture's) interest did not amount to an estate of inheritance, but was a mere life interest in the usufruct. * * * From that time (the death) to the passage of the Act of May 26, 1860, the whole title to the lands in controversy was in the government. * * * If we are right in our construction of the 6th article, upon Lavonture's death, there was nothing, so far as section nine was concerned, for such heirs to take. * * * *The law at the time the estate passes furnishes the rule.*"

The conclusion reached in the above case is almost identical with that reached by the Circuit Court of Appeals for the Eighth Circuit in the case of *McKee* v. *Henry, supra*, where it is said:

> "When the allotment was made, for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided."

In the Kansas case the question was whether the descent went to the heirs living at the date of the death or those living at the time of the subsequent grant of the estate, as well as what rule of descent governed. In the instant case we have only the second question. The principle however, is the same in both cases. It seems to us that the conclu-

sion reached in the *Belmarde* case is sound and that the rule stated there and in the *McKee* case is the rule of our case—that the law at the time the estate was created, the date of the allotment here, furnished the rule for identifying the heirs.

And a stronger reason for this rule is found in the scheme for allotment adopted by Congress; that is, that allotment or partition of the tribal estate involved the identification of allottees legally capable by designation of the statute, of agreeing to the terms of section 23 of the Act upon which the allotment was made.

If the title to the land in controversy vested in plaintiffs in error by a grant *in praesenti*, then as to such land, section 23 was inoperative. The statute provided for vesting title upon terms expressed in section 23. No exceptions are expressed or implied. The plaintiffs in error would have an exception created for them by taking a vested interest in the land without a compliance with the terms of this section.

Legislative Construction of the Act.

If there is any doubt of the meaning to be attached to the words used in section 28 of the Original Creek Agreement an examination of subsequent Acts of Congress dealing with the same subject matter may be resorted to for interpretation of that section.

> "And if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."
>
> —*United States* v. *Freeman*, 3 How. 556, 11 L. ed. 724.

The Original Creek Agreement of March 1, 1901, and the agreements with the Cherokee Nation and the Choctaw and Chickasaw Nations both of July 1, 1902, contained the first provisions made for allotting the fee of the lands to the members of the tribes, and each made provision for continuing and allotting the interests of deceased members.

Section 20 of the Cherokee Agreement (32 Stat. L. 716) reads as follows:

> "If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living, shall be allotted in his name, and shall, with his propor-

tionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted."

The provisions of the Choctaw-Chickasaw Agreement (32 Stat. L. 641), section 22 on the same subject is almost identical with that of the Cherokee Agreement.

These sections both provide that the lands shall be allotted, and shall descend. If the rule of descent had subsequently been changed in the Cherokee Nation, for instance before allotment, of course no one would contend that rights had vested in heirs under that law.

These sections were drawn to cover the identical situations in those tribes that was the object of legislation in the Creek Nation found in section 28 of the Creek Agreement. In the latter "descent" is mentioned before "allotment" and in the other treaties the reverse is true. The difference is only one of phraseology and no significance is to be seen in the fact that the provision for descent precedes that for allotment. All three treaties had in view

the same situation, sought the same result—that descent and allotment should operate simultaneously.

It seems to us that the Creek provision is to be construed in the light in which Congress has framed the provisions quoted from the Cherokee Agreement. Though in the Creek Agreement "descent" is used before "allotment," no purpose to give significance to that order is discoverable. They are stated together in the same paragraph, the law tells us that no interest could vest before allotment, and the attempt to give effect to the direction as to descent independently of the direction as to allotment is an evasion of the meaning and the purpose of the Act.

Plaintiffs in error are not entirely consistent throughout their brief. At times they say that when Ellis Grayson died before the first Creek Agreement he was seized of a right in the lands of the tribe that descended to his heirs. Their main contention seems to be that the Creek Agreement operated as a grant *in praesenti* to the heirs, but of just what tangible or intangible thing the grant consisted is not at all clear. Construing section 28 of the Act they say in one place that the lands descended, at another that the right to allot the lands descended. Above the confusion resulting from these various propositions stands out clearly the illustration of the difficulty attendant on their view of the law.

If the theory of plaintiffs in error is correct, Congress by the Original Creek Agreement created two dissimilar classes of rights in land in the members of the tribe.

First, the living Indians were given a right to have allotted to each of them a tract of land subject at all times before the right is exercised to the power of Congress to vary or entirely extinguish it.

—*Gritts* v. *Fisher*, 224 U. S. 640;
Stephens v. *Cherokee Nation*, 174 U. S. 445;
Cherokee Nation v. *Hitchcock*, 187 U. S. 294;
Wallace v. *Adams*, 143 Fed. 716.

Second, persons identifying themselves as heirs of a deceased Indian were given the right to have allotted to them in the place of such Indian, a tract of land, which right at all times before allotment was secure against the power of Congress to disturb. The same act granted a qualified right to one class and a vested right to another class; the latter class taking only by representation.

—Brief of counsel for plaintiff in error.

It seems to us that counsel are not only bound to subscribe to this proposition, but they must furnish a reason, which they have not done, why Congress should have intended such an unnecessary and inexpedient novelty in Indian legislation, before they can justify a reversal of the decision below.

That such a situation was never intended by Congress we have no doubt.

The Rule, If Descent Was Cast When Ellis Grayson Died.

We have not discussed the question as to what if any interest Ellis Grayson had when he died and what became of it, because it seemed to us that it is not involved in the case. We think that he had no interest that would descend until the allotment was made, but if he had a descendible estate when he died it passed to his heirs under the same Arkansas rule of descent we are contending for.

Sections 26 and 28 of the Curtis Act (30 Stat. L. 495) abrogated tribal courts and laws in Indian Territory. The Act of Congress of May 2, 1890 (26 Stat. L. 81, chap. 182), put in force in Indian Territory, among other laws, chapter 49 of Mansfield's Digest of the Laws of Arkansas.

In 1895 Congress provided by the Act of March 1 (28 Stat. L. 698), in section 13:

> *(Laws to remain in force.)* "That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory."

Again, Congress, by Act approved June 7, 1897 (30 St. L. 83), enacted, among other things, that:

"The laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, *irrespective of race*, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes."

The Curtis Bill of June 28, 1898, makes no mention of descent, and contains no provision for the allotment to the heirs in case of the death of a citizen before he receives such allotment.

If Ellis Grayson died seized and possessed of the right to an allotment of the surface rights, or to an allotment of lands under section 11 of the Curtis Act (excepting the oil, coal, asphalt and mineral deposits), and it should be held that there was any authority for the descent of this right, then we insist that the Arkansas law of descent and distribution which was in force in Indian Territory when he died nominated and determined the heirs.

It is our contention however, that neither the Curtis Bill nor the Original Creek Agreement operated to confer vested rights on Ellis Grayson or his heirs to an allotment and that the land subsequently allotted to him remained a part of the domain of the Creek Nation until its selection on August 23, 1902.

The Rules of Descent Under Discussion.

By section 6 of the chapter on the laws of descent and distribution, found in the edition of 1880 of the constitution and laws of the Creek Nation, it is provided:

> "*Civil Laws, Supplemental; Section 6.*
>
> "Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children the nearest relation shall inherit the property."

In this jurisdiction it has been determined that by the Creek law the mother and her heirs are nearer relations than the father and his heirs. *deGraffenreid* v. *Iowa L. & Tr. Co.*, 20 Okla. 687. It is under this provision of the Creek law that the plaintiffs in error claim the right to take the allotment of Ellis Grayson to the exclusion of the defendant in error.

Section 2532 of chapter 49, being the chapter on descents and distribution found in Mansfield's Digest of the Laws of Arkansas, reads as follows:

> "The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

It is contended by the defendant in error that this provision was made effective by the Creek Supplemental Agreement and governs the devolution of the lands allotted to the heirs of Ellis Grayson, there being no controversy as to the fact that the defendant in error is the only heir on the side of the father of Ellis Grayson. We claim that this statute named Foil M. Brady the defendant in error as the heir and that he took the lands allotted in the right of Ellis Grayson.

The decision in this case does not rest upon an innovation. On the contrary, as we have shown, the rule announced here has been adopted without qualification whenever the question has been considered by the Supreme Court of Oklahoma, the United States Circuit Court of Appeals for the Eighth Circuit, and the United States Circuit Court for the Eastern District of Oklahoma, the Courts in which the laws affecting the Five Civilized Tribes have been many times construed. And the decision rests not only on the consistent rulings by these Courts upon the identical question in other cases, but likewise upon the sanction of this Court in the cases cited.

Conclusion.

We believe therefore that the following propositions are established:

That when Ellis Grayson died he was seized of no estate that could descend.

That under the Original Creek Agreement, no allotment having been made in his name or right, there was no estate to descend or vest in the plaintiffs in error under the law of descent then in force, and that they took nothing either by descent or by the terms of the act.

That no allotment having been made, Congress had the power to repeal the provision that would have vested title in the plaintiffs in error if the land had been allotted under the act, and that this was accomplished by section 6 of the Supplemental Agreement substituting another rule of descent under which the allotment was made.

That when the allotment was made, for the first time the rights of any individual vested and the title became vested in the one at that time fixed by law.

That the allotment having been made under the Supplemental Agreement, the land then descended under the law of descent then in force which was chapter 49 of Mansfield's Digest of the laws of Arkansas.

That section 2532 of chapter 49 of Mansfield's Digest of the Laws of Arkansas identified the defendant in error Foil M. Brady as the only one at that time entitled to take the title to the allotment of the land in controversy, and the title to the lands in controversy, allotted to the heirs of Ellis Grayson vested in Foil M. Brady as the sole owner.

As these are the conclusions reached by the Supreme Court of Oklahoma we believe there was no error committed and that the judgment of that Court should be affirmed.

All of which is respectfully submitted,

GRANT FOREMAN,
Solicitor for Defendant in Error.

JAMES D. SIMMS,
Of Counsel.

SIZEMORE *v.* BRADY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 59. Submitted November 4, 1914.—Decided December 21, 1914.

The Original Creek Agreement of March 1, 1901, was not a grant *in præsenti* which invested the then living members of the tribe and their heirs with absolute rights that could not be recalled or impaired by Congress without violating the due process clause of the Fifth Amendment.

Unless and until the Original Creek Agreement of 1901 was carried into effect Congress possessed plenary power as before to deal with the lands and funds to which it related as tribal property. *Choate* v. *Trapp*, 224 U. S. 665.

The Supplemental Creek Agreement of 1902 and the Act of May 27, 1902, repealing the provisions of the act of March 1, 1901, recognizing the tribal laws of descent and distribution, and declaring that the descent and distribution of Creek lands and moneys should be in accordance with the specified laws of Arkansas, were valid acts within the plenary power of Congress to deal with Indians and their tribal property.

An exertion of the administrative control of the Government over tribal property of tribal Indians is subject to change by Congress at any time before it is carried into effect and while tribal relations continue.

The descent and distribution of a Creek Indian Allotment, not selected or made until after the Supplemental Creek Agreement of 1902 went into effect, are controlled under that agreement by Chapter 49 of Mansfield's Digest of the Law of Arkansas.

Under Chapter 49 of Mansfield's Digest of the Law of Arkansas a paternal cousin of the intestate inherits real estate to the exclusion of maternal cousins.

33 Oklahoma, 169, affirmed.

THE facts, which involve the construction of the provisions in the Original and Supplemental Creek Agreements regarding the descent and distribution of Creek Indian Allotments, are stated in the opinion.

Mr. Frederick E. Chapin, Mr. Andrew B. Duvall and *Mr. James B. Diggs* for plaintiffs in error:

Where an enrolled member, a citizen of the Creek Tribe or Nation of Indians, who dies prior to the going into effect of the act of March 1, 1901, 31 Stat. 861, known as the Creek Agreement, was, under the terms of such treaty entitled to receive an allotment, and died without having selected or received such allotment, the allotment such citizen would have been entitled to under the treaty had he lived to select and receive the same descends to his heirs under the Original Creek Agreement. These heirs are to be ascertained as of the date of the death of such enrolled Creek citizen, and the right of the heirs of such enrolled member or citizen of the Creek Nation to such allotment is a vested right, which cannot be impaired or taken away by subsequent legislation. In support of these contentions see *Aspey* v. *Barry*, 83 N. W. Rep. 91; *Auman* v. *Auman*, 21 Pa. St. 348; *Aytlett* v. *Swope*, 17 S. W. Rep. 208; *Ballentine* v. *Wood*, 9 Atl. Rep. 582; *Barclay* v. *Cameron*, 35 Texas, 242; *Barnett* v. *Way*, 119 Pac. Rep. 418; *Best* v. *Dow*, 18 Wall. 112; *Borgner* v. *Brown*, 33 N. E. Rep. 92; *Brown* v. *Belmarde*, 3 Kansas, 35; *Brooks* v. *Kip*, 35 Atl. Rep. 658; *Burke* v. *Modern Woodmen*, 84 Pac. Rep. 275; *Choate* v. *Trapp*, 224 U. S. 665, 671; *Cark* v. *Lord*, 20 Kansas, 390; *Cooper* v. *Wilder*, 43 Pac. Rep. 590; *Crews* v. *Burcham*, 1 Black, 352; *Dem. Man* v. *Wilson*, 23 How. 461; *Donivan* v. *Pitcher*, 53 Alabama, 411; *Doren* v. *Gillum*, 35 N. E. Rep. 1101; *Drew* v. *Carroll*, 28 N. E. Rep. 148; *Durbin* v. *Redman*, 40 N. E. Rep. 133; *Fabens* v. *Fabens*, 5 N. E. Rep. 650; *Gilmore* v. *Morrill*, 8 Ver. 74; *Goodrich* v. *O'Connor*, 52 Texas, 375; *Gould* v. *Tucker*, 105 N. W. Rep. 624; *Gray* v. *Coffman*, 10 Fed. Cas. 1003; *Ground* v. *Dingman*, 127 Pac. Rep. 1078; *Hall* v. *Russell*, 101 U. S. 503; *Haun* v. *Martin*, 86 Pac. Rep. 371; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Halstead* v. *Hall*, 60 Maryland, 209; *Henry Gas Co.* v. *United States*, 191

Fed. Rep. 137; *Hobbie* v. *Ogden*, 53 N. E. Rep. 106; *Irving* v. *Diamond*, 100 Pac. Rep. 557; *Jackson* v. *Lyon*, 9 Cowan, 664; *Johnson* v. *Norton*, 10 Pa. St. 245; *Jones* v. *Meehan*, 175 U. S. 1, 11; *Jumbo Cattle Co.* v. *Bacon*, 79 Texas, 5; *Leathers* v. *Gray*, 2 S. E. Rep. 455; *McCrea's Appeal*, 36 Atl. Rep. 412; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Meadowcroft* v. *Winnebago Co.*, 54 N. E. Rep. 949; *Mullen* v. *United States*, 224 U. S. 448; *Niles* v. *Anderson*, 5 How. 365, 383; *Prentice* v. *Stearns*, 113 U. S. 435; *Reichert* v. *Felps*, 6 Wall. 160; *Reynolds* v. *Fewell*, 124 Pac. Rep. 623; *Rock Hill College* v. *Jones*, 47 Maryland, 1; *Shallenberger* v. *Fewell*, 124 Pac. Rep. 617; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *Spangenberg* v. *Guiney*, 3 Ohio Dec. 163; *Starnes* v. *Hill*, 112 Nor. Car. 1; *Starr* v. *Hamilton*, 22 Fed. Cas. 1107; *Stratton* v. *McKinne*, 62 S. W. Rep. 636; *Tate* v. *Townsend*, 16 Mississippi, 316; *Turner* v. *Fisher*, 222 U. S. 204; *United States* v. *Brooks*, 10 How. 42, 460; *Walker* v. *Ehresman*, 111 N. W. Rep. 219; *Ward* v. *Stow*, 27 Am. Dec. 239; *White* v. *Martin*, 66 Texas, 340; *Wilburn* v. *Wilburn*, 83 Indiana, 55; *Wittenbrook* v. *Wheadon*, 60 Pac. Rep. 664; *Wray* v. *Doe*, 10 Smedes & M. 452, 461.

If the act of June 30, 1902, 32 Stat. 500, known as the Supplemental Creek Agreement which was in force at the time of the selection of the land, determines the heirs, such agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the Supplemental Agreement; but such Supplemental Agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect. *Carroll* v. *Carroll*, 16 How. 275; *Chew Heong* v. *United States*, 112 U. S. 536; *City R. R.* v. *Citizens Railway*, 166 U. S. 557; *Murry* v. *Gibson*, 151 How. 421; *United States* v. *Peggy*, 1 Cranch, 103; *White* v. *United States*, 101 U. S. 545; note 12, L. R. A. 50.

Mr. Grant Foreman and *Mr. James D. Simms* for defendant in error:

A duly enrolled citizen of the Creek Nation who died on March 1, 1901, without having selected an allotment of land, died seized and possessed of no interest either legal or equitable in the domain of the Creek Nation, and no persons claiming to be his heirs at any time after his death and before allotment had a vested right to land to be allotted in his name or right. They had a mere expectancy, subject to be changed or extinguished by subsequent acts of Congress. *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427; *Shellenbarger* v. *Fewel*, 124 Pac. Rep. 617.

The mere right to allot land of the Creek Nation was not a vested right before it was exercised, because it was subject at any time to be withdrawn. *Gritts* v. *Fisher*, 224 U. S. 640; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

For analogous cases under preemption laws, see: *Emblen* v. *Lincoln Land Co.*, 102 Fed. Rep. 559; *Hutchings* v. *Low*, 15 Wall. 77; *Frisbie* v. *Whitney*, 9 Wall. 187; *Campbell* v. *Wade*, 132 U. S. 34.

The lands of the Creek Nation before allotment were held by the Tribe for the common use of the members, and no right in severalty could be asserted by any member. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 292; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Eastern Band* v. *United States*, 117 U. S. 288; *Ligon* v. *Johnson*, 164 Fed. Rep. 670; *Stephens* v. *Cherokee Nation*, 174 U. S. 488.

Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe were under the special guardianship of Congress and it had plenary authority over them. *McKee* v. *Henry*, 201 Fed. Rep. 74;

Lone Wolf v. *Hitchcock*, 187 U. S. 553; *United States* v. *Kagama*, 118 U. S. 375; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choctaw Nation* v. *United States*, 119 U. S. 1.

The selection or allotment of the land was the initiatory step and was prerequisite to the vesting of any individual title or interest in the land of the tribe. *Hooks* v. *Kennard*, 28 Oklahoma, 457; *deGraffenried* v. *Iowa Land Co.*, 20 Oklahoma, 687; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427; *Hayes* v. *Barringer*, 168 Fed. Rep. 221.

The purpose of § 28 of the Original Creek Agreement was to establish a basis for the allotment of the lands of the tribe. A legislative grant to any member or the vesting of rights by any method other than by allotment is foreign to the general purpose of the act and is not expressed nor intended.

If decedent had no vested right in this land before allotment, no greater estate vested in his heirs.

Application of § 6 of the Creek Supplemental Agreement changing the rule of descent of lands allotted after the act, in the right of citizens dying before the act, is not to be denied on the ground that it would operate retrospectively. In view of the purpose to be accomplished and the state of the subject-matter, the operation was not retrospective. The power reposed in Congress and the legislation discloses the intention to make all lands allotted to heirs after the date of the act, descend according to the rule of descent in force at the date of the allotment, regardless of what rule of descent was in force before the act. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427.

Allotment was necessary to segregate and vest a member's interest in lands of the tribe. *Choate* v. *Trapp*, 224 U. S. 665.

Reason for the amendment is found in § 6 of the Supplemental Agreement.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit to determine conflicting claims to an allotment selected and made after August 8, 1902, on behalf of Ellis Grayson, a Creek citizen duly entitled to enrollment, who died unmarried March 1, 1901, leaving as his only surviving relatives three first cousins, one on the paternal and two on the maternal side. All were Creek citizens. In the papers evidencing the selection and approval of the allotment, as also in the ensuing tribal deed, the beneficiaries were designated as the "heirs" of the deceased, without otherwise naming them; and this was in accord with the usual practice. The suit was brought by the paternal cousin, who insisted that the title under the allotment and tribal deed passed to him alone. The others were made defendants and answered asserting an exclusive right in themselves. Each side also advanced an alternative claim that the three took the land in equal parts. Two questions of law were involved: First, whether the beneficiaries were to be ascertained according to the Creek tribal law or according to an Arkansas law presently to be noticed; and, second, whether the governing law preferred either paternal or maternal relatives when all were of the same degree. The trial court, concluding that the tribal law was applicable and preferred maternal relatives, gave judgment for the defendants; but the Supreme Court of the State held that the Arkansas law was controlling and preferred paternal relatives, so the decision below was reversed with a direction that judgment be entered for the plaintiff. 33 Oklahoma, 169. The defendants then sued out this writ of error.

Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in

the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible. Under treaty stipulations the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient and in time proved unsatisfactory. Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government. This Congress undertook to do. The earlier legislation was largely preliminary and need not be noticed.

The first enactment having a present bearing is that of March 1, 1901, c. 676, 31 Stat. 861, called the Original Creek Agreement, which went into effect May 25, 1901, 32 Stat. 1971. It made provision for a permanent enrollment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation. In § 28 this act directed that the enrollment, except as to children, should include "all citizens who were living" on April 1, 1899, and entitled to enrollment under the earlier legislation, and then declared that "if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

So much of that act as recognized the tribal laws of descent and distribution was repealed by the act of May 27, 1902,[1] c. 888, 32 Stat. 245, 258, which also provided: "and the descent and distribution of the lands and moneys provided for in said act [March 1, 1901] shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." This was repeated, with a qualification not material here, in § 6 of the act of June 30, 1902, c. 1323, 32 Stat. 500, called the Supplemental Creek Agreement, which went into effect August 8, 1902. See 32 Stat. 2021; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 301.

Ellis Grayson was living April 1, 1899, and entitled to enrollment. Had he lived he would have been entitled, under the original agreement, to participate in the allotment and distribution of the tribal property. But he died March 1, 1901, before the agreement went into effect and without receiving any part of the lands or funds of the tribe. In these circumstances the agreement contemplated that his heirs should take his place in the allotment and distribution and should receive "the lands and money to which he would be entitled, if living;" and it also contemplated that effect should be given to the Creek laws of descent and distribution in determining who were his heirs and in what proportions they were to take the property passed to them in his right. But, as before said, the act of May 27, 1902, and the supplemental agreement repealed the provision giving effect to the Creek laws of descent and distribution and substituted in their stead the laws of Arkansas embodied in Chapter 49 of Mansfield's Digest. This change went into effect before the allotment in question was selected or made, and has an important

[1] This act went into effect July 1, 1902. See Joint Resolution No. 24, 32 Stat. 742.

bearing here, because, according to the Creek laws,[1] the maternal cousins were either the sole heirs or joint heirs with the paternal cousin, while according to the Arkansas laws [2] the paternal cousin was the only heir.

On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in præsenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in præsenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the

[1] Perryman's Compiled Creek Laws of 1890, p. 32, § 6; Bledsoe's Indian Land Laws, 2nd ed., § 829.

[2] Mansfield's Digest, § 2532.

adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate* v. *Trapp*, 224 U. S. 665, 671.

In principle it was so held in *Gritts* v. *Fisher*, 224 U. S. 640. There an act or agreement of 1902 had made provision for allotting and distributing the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an act of 1906 had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906 should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): "No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423."

We have seen that the allotment in question was not selected or made until after the supplemental agreement went into effect. The heirs designated in chapter 49 of Mansfield's Digest were therefore the true beneficiaries. According to its provisions, as is conceded, the paternal cousin was the sole heir.

Judgment affirmed.